Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

STATE OF OHIO EX REL. THEODORE J. HORVATH,
Petitioner,

v.

THE STATE TEACHERS RETIREMENT BOARD,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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110 pp

QUESTION PRESENTED

Ohio Revised Code Section 3307.651(2) prohibits the Ohio State Teachers Retirement System from paying interest on the mandatory contributions of a teacher when they 1) are withdrawn by a former teacher before retirement or 2) are refunded to the beneficiary of the teacher if she dies before retirement.

The question presented is whether such non-payment of interest results in a violation of the Takings Clause of Amendment V of the United States Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Supreme Court of Ohio were State ex rel. Theodore J. Horvath and The State Teachers Retirement Board.

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PETITION FOR A WRIT OF CERTIORARI

Theodore J. Horvath ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reprinted at pages A2-A19 of the Appendix and is reported at 83 Ohio St.3d 67, 697 N.E.2d 644 (1998) The order of the Supreme Court of Ohio denying Petitioner's motion for reconsideration is reprinted at A50 and is unreported. The opinion of the Court of Appeals of Ohio, Tenth Appellate District, is reprinted at A21-A35 and is unreported. The opinion of the Court of Common Pleas, Franklin County, Ohio is reprinted at A38-A49 and is unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on August 19, 1998. The order of the Supreme Court of Ohio denying reconsideration of its judgement was entered on October 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the following constitutional and statutory provisions are printed in the Appendix attached hereto:

United States Constitution, Amendment V, Takings Clause

Ohio Revised Code Chapter 3307, Sections:

3307.01(I)	3307.38	3307.48(B)	3307.65
3307.03	3307.405	3307.49(C)	3307.651
3307.15(A)	3307.42(A)	3307.51	3307.66
3307.19	3307.43	3307.53	3307.711

3307.28 3307.46 3307.58 3307.80

United States Code Sections:

29 U.S.C. 1053(a)(1) 29 U.S.C.1054(c)(2)(A), (B) and (C)

STATEMENT OF THE CASE

A. The Facts.

Petitioner's wife, Sydney P. Horvath ("Mrs. Horvath"), was a teacher in the city of Bedford, Ohio, school system from 1951 to 1964, when she stopped teaching to become a housewife and mother. While she was a teacher, Mrs. Horvath was required by statute to participate in the STRS and contribute $4,474.74 out of her salary. Her contributions were credited to her account and placed in the teachers' savings fund, a separate trust fund of the STRS. She also received credit for $65.77 of interest on her contributions up to August 31, 1959 ("pre-1959 interest") and accumulated 12.85 years of service credit. Having at least five years of service, Mrs. Horvath was entitled to receive a retirement benefit at age 60, but only if she did not withdraw her contributions in the meantime.

Mrs. Horvath died on June 19, 1989, about 7-1/2 months before she would have attained age 60 and would have received a retirement benefit of $545.19 per month or $6,542.28 per year for life, computed on the basis of a benefit reserve of $69,952.12. This reserve included: 1) her contributions and pre-1959 interest totaling $4,540.51 and a credit of $29,435.55 of interest from September 1, 1959 to January 30, 1990 (post-1959 interest"); and, 2) an equal amount of her employer's contributions and the pre- and post-1959 interest thereon. Because Petitioner, as Mrs. Horvath's beneficiary, was not eligible to receive a survivor benefit, he received only a refund of Mrs. Horvath's contributions and her pre-1959 interest - $4,540.51; and, due to the "No-interest

Statute" described below, suffered a forfeiture of all her post-1959 interest accrued to her date of death - almost all of the $29,435.55.[1]

Ohio created the State Teachers Retirement System ("STRS") in 1920, as its agency to own and operate a pension plan ("Plan") for all teachers employed by all public schools, colleges and universities in Ohio. The provisions of the Plan are set forth in Ohio Revised Code Chapter 3307.

Ohio Revised Code Section 3307.58,[2] A60, requires that every teacher in Ohio must participate in the Plan and her employment is conditioned upon her acceptance of her obligations under the Plan as a part of her employment contract. Both teachers and their employers must contribute into the STRS. R.C. 3307.51 and .53. A59-A60. The STRS must invest all contributions. R.C. 3307.15(A). A53. The contributions of a teacher are credited to her account and placed in the teachers' savings fund, a separate legal trust fund entity of the Plan, where they are held by the STRS, in trust, for the exclusive benefit of the teacher and her beneficiary. R.C. 3307.15(A), .19, .65(A) and .66. A53, A61 and A64.

The STRS does not credit to teachers' accounts the earnings and gains derived from the investment of their contributions. Instead, it pays them into its guarantee fund, also a separate legal entity, from where they are used: 1) to credit interest on teacher and employer contributions; 2) to fund the employers' portion of retirement, disability and survivor benefits; and, 3) to pay "[a]ny deficit in any other fund", including the expense fund for administering and

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[1] Petitioner also suffered a forfeiture of the matching contributions made by Sydney's employer as deferred compensation for her services as a teacher and both the pre- and post-1959 interest thereon.

[2] Ohio Revised Code Sections will hereinafter be cited as R.C. 3307.XX. References to the Appendix will be cited as AXX.

managing the STRS. R.C. 3007.65(E) and (F) and .66. A62-A63 and A64. Any insufficiency in any fund must be made up by additional employer contributions. R.C. 3307.65(E) and .53. A62 and A60.

Until August 31, 1959, the STRS credited compound interest annually on teacher contributions at rates determined by Respondent as representing the earnings and gains on teacher contributions, less Plan expenses ("net earnings"). R.C.3307.651(1). A63. As a result, such interest became a part of the "accumulated contributions" withdrawable by a former teacher before retirement or refunded to her beneficiary if she died before retirement, R.C. 3307.01(I), .46 and.48(B), A52, and A58, or applied to compute her retirement benefit if she retired. R.C. 3307.38(B) and (C).[3] A54 and A56.

Effective September 1. 1959 (for convenience hereinafter referred to as "1959"), the predecessor to R.C. 3307.651 was amended to prohibit the crediting of interest until the teacher retired. In 1964, the statute was further amended to eliminate the crediting of interest even at retirement, unless it was a necessary element in computing the retirement benefit of the teacher under R.C. 3307.38 (C). These two amendments, now contained in R.C. 3307.651(2) and (3), constitute what Petitioner calls the "No-interest Statute" and read as follows:

> "(2) Subsequent to August 31, 1959 interest shall be credited to accounts only at retirement.
>
> "(3) If the amount of the account at retirement is not a factor in determining the allowance, interest

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[3] "Withdrawal" and "refund" as used herein mean both withdrawal by a former teacher and refund to a beneficiary of a deceased teacher, or either, as the context requires.

shall not be credited to such account after September 1,1964."[4] [5] A63-A64.

Under the No-interest Statute, interest is excluded from the "accumulated contributions" of a teacher when they are withdrawn, but such previously uncredited interest is credited at retirement to include it in the teacher's "accumulated contributions" if needed to compute her retirement benefit.

A teacher with five years of service at age 60, or 25 years at age 55 or 30 years is entitled to retire with a retirement benefit equal to whichever of the following amounts is greater:

1. The sum of (a) an annuity computed on the basis of all her accumulated contributions (including interest); and (b) a pension in the same amount funded by employer

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[4] The Ohio Supreme Court ruled it would not be necessary to invalidate R.C. 3307.651(3). A4. However, if clause (2) is invalidated, clause (3) would become inconsistent with the resumption of annual crediting of interest under clause (1).

In 1995, Petitioner complained of the No-interest Statute to a committee of the Ohio legislature. Appalled, the committee urged the STRS to propose a change, especially since the STRS was proposing an amendment to allow university professors and administrators to transfer contributions, *with interest*, to a self-directed investment plan. The STRS proposed, and the legislature enacted, R.C. 3307.80, effective March 31, 1997. A64. It provides that, in the case of a teacher with at least five years service, the amount paid on a withdrawal shall be 1-1/2 times the teacher's contributions plus compound interest thereon at a rate not more that 6% fixed by Respondent. R.C. 3307.80 still leaves Petitioner and another 250,000 or so persons uncompensated for the taking of net earnings on contributions withdrawn before March 31, 1997, and does not apply to the four other Ohio public employee pension plans which also have no-interest statutes. The No-interest Statute still prohibits the crediting of interest prior to retirement.

To the extent the interest rate fixed by the Respondent under R.C. 3307.80 denies a teacher a rate of interest reasonably equivalent to the net earnings of the STRS on her contributions, it is confiscatory. Over the years, the net earnings rate on STRS assets has been substantially greater than the interest rate credited on contributions.

[5] The rights of Petitioner are based on the Plan as in effect before R.C. 3307.80 became effective. Therefore, unless otherwise stated, all sections of Chapter 3307 cited herein and descriptions of the Plan are those in effect before March 31, 1997.

contributions and interest credited thereon; and, (c) certain other minor amounts, R.C. 3309.38(C); or

2. An amount computed on the basis of her final average salary and years of service: R.C. 3307.38(B).[6]

The plan also provides for disability benefits, payable if a teacher becomes disabled while teaching, and survivor benefits, payable if she dies while eligible to retire or after 1-1/2 years of service one-quarter of which was performed within 2-1/2 years of her death. Disability and survivor benefits are computed generally in the same manner as retirement benefits with certain reducing factors for payment before age 60 and minimums for payments to dependents. R.C. 3307.42(A), .43, .48(B) a .49(C). A57 and A58.

A former teacher may leave her contributions in the Plan; and, if she has at least five years of service and lives to age 60, she receives a retirement benefit. On the other hand, if she withdraws her contributions, then she forfeits: 1) all post-1959 interest accrued on her contributions because of the No-interest Statute, as described above; and, 2) all her unvested rights as a member of the STRS, including rights to retirement, disability and survivor benefits funded both by her own and her employer's contributions and the interest thereon, as well as participation in the STRS health insurance plan available to recipients of retirement or survivor benefits. R.C. 3307.28 and .405. A54 and A56. Similarly, if a teacher dies and her beneficiary is not entitled to a survivor benefit, then the beneficiary receives only a refund of contributions and forfeits any post-1959 interest. R.C. 3307.01(I) .48(B) and .651(2). A52, A58 and A63.

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[6] Regardless of which formula applies, the teacher receives the full benefit of all pre- and post-1959 interest in the computation of her retirement benefit.

B. The Proceedings Below.

Petitioner filed this case on October 7, 1992 in the Franklin County, Ohio, Court of Common Pleas ("Trial Court") as a class action seeking a declaratory judgment (and injunctive and mandamus relief) that the No-interest Statute is invalid because it: 1) impairs the contractual obligation of the STRS to pay interest on withdrawn contributions by pre-1959 members, takes the use of teacher contributions without just compensation, and denies equal protection of the laws between non-retiring and retiring members, all in violation of the United States and Ohio Constitutions; 2) is an unconscionable contract provision; and, 3) for three other reasons. A25 and A41, A43, A44, A45 and A46. Respondent filed an answer on November 6, 1992, denying all of Petitioner's claims and asserting eight affirmative defenses.

On September 2, 1993, Petitioner filed a motion to certify this case as a class action, which the Trial Court denied on June 9, 1994. On ,March 31, 1995 the Court of Appeals of Ohio, Tenth Appellate District ("Court of Appeals") affirmed, but held that if the No-interest Statute is ruled invalid, then certification may be appropriate to apply the decision to all class members. On August 17, 1995, the Court of Appeals denied Petitioner's motion for reconsideration. The Ohio Supreme Court declined jurisdiction on September 20, 1995.

The Trial Court. On August 26, 1993, Respondent filed a motion to dismiss the Complaint for failure to state a claim and for judgment on the pleadings on Respondent's affirmative defenses. On June 5, 1996, the Trial court granted Respondent's motion to dismiss all seven claims in the Complaint and for judgment on the pleadings on three of Respondent's affirmative defenses, namely, laches, equitable estoppel and waiver.

On the taking issue, Petitioner argued in the Trial Court, and in the Appeals and Supreme Courts, that *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980) is directly on point, requiring the conclusion that: 1) the mandatory deposit of a teacher's money into the STRS is a temporary taking; 1) that the placement of the earnings and gains thereon in the guarantee fund of the STRS for general Plan use is a permanent taking; and, 3) that the termination of the payment of interest during the period the STRS possessed, invested and used a teacher's contributions left those temporary and permanent takings uncompensated in violation of the Takings Clause of the Fifth Amendment. Petitioner also pointed out that this Court made clear in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-6, 432 (1982), and in *Webb's,* that the three prong test this Court applied in *Penn Central Transportation Co. v. New York,* 438 U.S. 104 (1978), to determine whether a regulation of the use of property is so pervasive as to be tantamount to a physical taking of possession,[7] does not apply to a case, like this case, where the government does not merely regulate use, but takes physical permanent or temporary possession of real or personal property and appropriates its earnings.

The Trial Court made no mention of *Webb's* or *Loretto.* Instead, it cited *Penn Central and* followed *Kodish v. Public Employees Retirement Board,* 45 Ohio App.2d 147, 74 O.O.2d 167, 341 N.E.2d 320 (Ct. App. Tenth App. Dist. 1975), in which the same Court of Appeals that reviewed this case had ruled that the no-interest statute in Ohio's Public Employees Retirement System ("PERS") did not violate the United States or Ohio Constitutions, because:

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[7] The three prong test calls for considering: 1) the character of the governmental action; 2) its economic impact on the property owner; and, 3) its interference with the owner's reasonable investment-backed expectations.

"State employees have no vested property right in their contributions [or the earnings thereon] to a compulsory retirement system unless and until such rights are granted by specific legislation or rule." *Id.* at 153, 74 O.O.2d at 170-171 and 341 N.E.2d at 324. A45.

The Court of Appeals. On August 1, 1996, Petitioner appealed to the Court of Appeals the Trial Court's dismissal of four of Petitioner's claims, namely, violations of the contract impairment, taking and equal protection provisions of the United States and Ohio Constitutions and the unconscionable contract claim, and the Trial Court's granting of the judgment on the pleadings on Respondent's three affirmative defenses. On April 29, 1997, the Court of Appeals affirmed the Trial Court's dismissal of the Complaint and ruled that its decision rendered moot the issue of Respondent's affirmative defenses.

On the issue of taking, the Court of Appeals ruled that *Webb's, supra,* was distinguishable from this case, because unlike a deposit by a stakeholder, STRS funds are deposited and invested soley for the benefit of participants and their beneficiaries. The Court then followed its previous *Kodish* decision to hold that a teacher had only such property rights in her contributions as are provided by statute. The Court of Appeals then ruled that R.C. 3307.711, which provides that the grant of a "retirement allowance, annuity, or pension" vests in a recipient a right to a benefit which cannot be reduced, also applies to divest a teacher of any property right in her contributions and the interest thereon prior to withdrawal or death. Therefore, the State can amend its statutes to prohibit the refund of contributions or the payment of interest thereon before they are withdrawn. The Court added that the availability of Plan benefits to Mrs. Horvath while she was a teacher was compensation anyhow, even though she never had a vested right in any of those benefits and never received any benefit payments. A32-A34.

The Ohio Supreme Court. On June 13, 1997, Petitioner filed a discretionary appeal in the Ohio Supreme Court. On September 17, 1997, the Ohio Supreme Court accepted the appeal and on August 19, 1998, affirmed the Court of Appeals decision that R.C. 3307.651(2) did not violate the contract impairment, taking and equal protection provisions of the United States and Ohio Constitutions and was not an unconscionable contract provision. On October 7, 1998, the Ohio Supreme Court denied Petitioner's motion for reconsideration.

On the issue of taking, the Ohio Supreme Court applied the three prong taking test of *Penn Central* to find no taking of teacher contributions. The Court erroneously concluded Petitioner "likens STRB's retention of interest on . . . [teacher contributions] to 'physical occupation of property'" similar to *Loretto*. Then, the Court stated that *Loretto* did not foreclose the application of the *Penn Central* taking test, because in this case the government did not take physical occupation of private property for its own use, as it had in *Loretto*, and Mrs. Horvath had no property right to interest on her contributions. A6.

Then, the Court stated that the character of governmental action in this case was similar to that in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986), in which this Court had applied the *Penn Central* test, because the government, in that case, had not appropriated private assets for its own use. Rather, a statute safeguarded participants in a multi-employer pension plan by requiring a withdrawing employer to make an added contribution to fund his own unfunded liability for benefits earned by his employees. The Ohio Supreme Court asserted that, similarly, Mrs. Horvath's contributions were used to benefit STRS participants (not merely Mrs. Horvath); and, any resulting benefit to the state was indirect and did not

equate with physical invasion or permanent appropriation of Plan assets for government use. A6-A7.

Applying the three prong *Penn central* test, the Court concluded that : 1) the character of governmental action in this case was economic legislation adjusting benefits and burdens similar to *Connolly* and dissimilar to the physical invasion in *Loretto*; 2) the severity of the economic impact on Mrs. Horvath was offset by the availability of plan benefits while she was a teacher and her right to withdraw her contributions when she stopped teaching and invest them profitably elsewhere; and 3) Mrs. Horvath's reasonable investment-backed expectation of receiving interest ended in 1959 when the No-interest Statute was enacted.[8] A7-A10.

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[8] While Petitioner maintains that these two prongs do not apply (see Part I, below), it is noted that the Court ignored the facts that 1) Mrs. Horvath never had any vested rights in or received any Plan benefits before her death to set-off against her forfeited interest and 2) by withdrawing, she would have incurred a tremendous forfeiture of her unvested right to receive at age 60 an annuity funded by her contributions and the interest thereon and a pension of at least equal amount funded by her employer's contributions and the earnings thereon, as well as her right to receive medical benefits. The loss of those benefits, added to the loss of interest, make the economic impact *much more severe;* so much so, that the STRS cautions former teachers to think twice before giving up future benefits by withdrawing.

Mrs. Horvath's expectation of receiving interest was backed by her investment of forced savings and her services as a teacher. Her expectation was reasonable, because it is axiomatic in our economy and legal system that a person is entitled to at least interest in exchange for allowing someone else to use her money.

The third prong is premised on having knowledge and freedom to act to avoid loss. Even if Mrs. Horvath knew of the No-interest Statute, which she did not, she had to surrender to the No-interest Statute in order to teach in Ohio public schools, cruelly placing her between a rock and a hard place. To preserve her rights to benefits at age 60, she had to take the risk that untimely death would cause her to forfeit, not only those benefits, but also interest on her refunded savings. To avoid the risk of forfeiting interest, she had to withdraw her contributions and forfeit her accrued benefits. Most former teachers stay the course, not because they don't care about the interest, but because, absent an expectancy of early death, the value of their accrued benefits is too great. In a situation such as this case, it is irrational to apply the third prong, for acting to avoid loss creates an even larger unacceptable loss.

Finally, the Ohio Supreme Court ruled that *Webb's* did not apply to this case, because the fund involved in W*ebb's* was private property held for the benefit of Webb's creditors. In contrast, stated the Court, mandatory teacher contributions result from economic legislation designed to benefit teachers and their beneficiaries and, when placed in the STRS, "lose their character as private property;" and, refunds of teacher contributions are "statutory benefits", citing the *Kodish* case. Accordingly, it held that the property rights of a contributor are determined "solely by the statutes that govern the [STRS]". A10-A12.

The Ohio Supreme Court made no mention in its opinion of the net earnings realized by the STRS on teacher contributions and what happens to them. Instead, the Court erroneously asserted that Petitioner's argument under *Webb's* focuses soley on "a constitutional property right to interest earned on STRS contributions". A10.

In his motion for reconsideration, Petitioner reminded the Court that he had not likened the retention of interest by the STRS to physical occupancy of property and he had not claimed a constitutional property right to interest. Rather, he had plainly asserted in his initial and reply briefs that: 1) as a matter of Ohio property law, Mrs. Horvath was the owner of her contributions while they were in the Plan; 2) that the Plan temporarily took those contributions; 3) that under the universal rule that earnings on property belong to the owner of the property adopted by the Ohio Supreme Court in *Eshelby v. The Cincinnati Board of Education*, 66 Ohio St. 71, 74, 63 N.E. 586 (1902), the net earnings on Mrs. Horvath's contributions belonged to her; 4) that the Plan permanently took those net earnings to reduce the cost of the public employers for their share of Plan benefits; and, 5) from the time the No-interest Statute was enacted, the non-payment of interest caused those takings to be uncompensated. A51-A52.

The Court denied Petitioner's motion for reconsideration without comment. A50.

REASONS FOR GRANTING THE WRIT

I. THE OHIO SUPREME COURT MISSAPPLIED THE DECISIONS OF THIS COURT IN *PENN CENTRAL TRANSPORTION CO. V. NEW YORK, LORETTO V. TELEPROMPTER MANHATTAN CATV CORP.* AND *CONNOLLY, ETC. V. PENSION BENEFIT GUARANTY CORPORATION.*

This Court has recognized two kinds of situations which raise the question of whether a taking of private property has occurred: 1) government imposed restrictions on the use of private property, as in *Penn Central, supra;* and, 2) government mandated permanent or temporary physical occupation or use of property by government or some private owner, as in *Loretto* and *Webb's,* both *supra.*

This Court should clarify that its decisions in *Loretto* and *Webb's,* not *Penn Central,* apply to the physical taking of earnings on mandatory employee contributions in a public employee pension plan.

The Ohio Supreme Court erroneously treated this case as a *Penn Central* situation, as though it involves regulation of the use of property and not the temporary and permanent occupancy of private property as in *Loretto* and *Webb's.* It did so by erroneously concluding that:

1. The government action in this case is not a physical occupation for the government's use, as in *Loretto,* and Mrs. Horvath had no property right to interest on her contributions; and

2. Mandatory teacher contributions arise out of economic legislation similar to that in *Connolly, supra.*

Penn Central, involved regulation of the use of private "landmark" property, without any mandated transfer of occupancy to the government or anyone else. This Court, in holding there was no taking, enumerated three factors which should be considered on a case-by-case basis to determine whether the regulation resulted in a taking: 1) the character of the governmental action, 2) its economic impact on the property owner, and 3) the extent to which it has interfered with the reasonable investment-backed expectations of the owner. This Court then differentiated between regulation and physical invasion as follows:

> "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. (Citation omitted.)

In *Loretto*, a statute required an apartment building owner to allow a private cable TV company to permanently attach its facilities to the apartment building, not to government property as the Ohio Supreme Court erroneously stated. This court held there was a taking. Regarding the application of the three *Penn Central* factors, this Court said:

> " . . . [W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking *but also is determinative.* 458 U.S. at 426. (Emphasis added.)

Two years before *Loretto,* this Court had applied the same analysis in *Webb's* to the temporary occupation by the government of personal property - money - and the withholding of the earnings thereon when it was returned to the owner. There this Court said:

> "This Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare.
>
> "Here, however, Seminole County has not merely 'adjust[ed] the benefits and burdens of economic life to promote the common good.' . . . Rather, the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts." (Citations omitted.) 449 U.S. at 163.

Thus, contrary to the Ohio Supreme Court's conclusion that this is a *Penn Central* case, *Loretto* and *Webb's* make clear that it is not. Once it is established that the government action involved is a mandated transfer of occupancy of private property either to the government or a private party, the character of the government's action is determinative, without resort to the other *Penn Central* factors. And, it makes no difference whether the property is real or personal or the occupancy is permanent or temporary.

This is understandable, for the Taking Clause contains no *di minimus* or unreasonable expectation exceptions. Only where there is a restriction on use without a change in occupancy is it helpful to consider whether the restriction has such a great economic impact or interference with expectations as to make the restriction tantamount to a change in physical occupancy.

In *Connolly*, a statute required an employer in a multi-employer pension plan, who wished to withdraw from the plan, to contribute an amount in addition to what he was contractually required to contribute, so as to fund *his own unfunded liability* for the benefits earned by his employees. Without such added payment, the employers remaining in the plan ultimately would have had to fund that liability, encouraging even more employers to withdraw, thereby jeopardizing the plan. Stated plainly, the effect of the statute was to require the withdrawing employer to pay his own bills so as not to "stick" those remaining in the plan with his obligation.

This Court held that the nature of the governmental action in *Connolly* did not constitute a taking, for the statute required the employer to transfer his assets, not to the government, but to the plan as part of a public program adjusting, that is, regulating, the burdens and benefits of economic life. 475 U.S. at 225. Accordingly, this Court applied *Penn Central* rather than *Loretto* to find no taking. 475 U.S. at 225-227.

Contrary to the view of the Ohio Supreme Court, this case is not like *Connolly*. First, teacher contributions are not made to discharge the liability of a teacher for an obligation she has to someone else. They are required as retirement savings by the teacher for her own benefit, temporarily held by the STRS, in trust, as her property only for application to fund her retirement benefit or to be refunded to her or her beneficiary. Second, teacher contributions are never applied to benefit anyone other than the contributing teacher or her beneficiary. Third, the net earnings on teacher contributions are permanently kept by the STRS and applied to reduce the cost of funding the public school employer portion of Plan benefits, except insofar as interest is credited on teacher contributions from those earnings. The character of these Plan provisions is a temporary occupation and use of teacher

contributions and a permanent occupation of the net earnings thereon. The purpose and effect of these occupations is to temporarily use a teacher's property to produce net earnings which are permanently appropriated by the STRS for public purposes, except to the extent credited to teachers in the form of interest. These are temporary and permanent takings of property under *Loretto* and *Webb's*, making it unnecessary and inappropriate to examine them under *Penn Central*.

Moreover, contrary to the Ohio Supreme Court's conclusion, the Plan is not an economic program designed to adjust burdens and benefits for the public good. It is a proprietary pension plan, which Ohio decided to own and operate instead of requiring school employers to go into the private pension plan market where they could have obtained the same benefits. The Plan regulates nothing. It requires participation, contributions, investment thereof, payment of benefits and refunds and has various requirements for its orderly operation.

In broad terms, most legislation can be characterized as economic, that is, embodying a public program or public policy to adjust the benefits and burdens of economic life to promote the common good. Some statutes try to promote the common good by regulating the use of private property as in *Penn Central*. Others require the transfer of private property to the government or a private person as in *Loretto, Webb's and Connolly*. In both instances, the critical taking question is: what does the legislation do to private property, regardless of any regulatory or economic role it might have? This Court recognized this distinction in *Loretto*. The lower court had determined that the required free attachment of cable TV facilities on private property served the legitimate public purpose of rapid development of cable TV with its educational and community benefits. This court stated in response:

> It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. . . . [A] permanent physical occupation is a taking without regard to the public interests it may serve. *Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention."* 458 U.S. at 425-6. (Citations omitted and emphasis added.)

Later in its opinion, this Court emphasized:

> "[W]hen the 'character of the government action' . . . is a permanent physical occupation of property, our cases have found a taking to the extent of the occupation, *without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. at 434. (Citation omitted and emphasis added.)*

Two years earlier, in *Webb's* this Court had held the same in the case of personal property temporarily taken and its earnings permanently taken.

So, in this case it is not enough to say that the STRS Plan is economic legislation that adjusts benefits and burdens. Even if it is, any private property it appropriates in the process of carrying out its public purpose is a taking, whether large or small in economic impact or unreasonably expected.

II. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *WEBB'S FABULOUS PHARMACIES, INC. V. BECKWITH.*

The Ohio Supreme Court failed to see that this is purely and simply a *Webb's* case.

This Court held in *Webb's, supra,* that a mandated temporary physical occupation of privately owned money by the government and its permanent retention of the earnings thereon were takings and that, to reach that conclusion, it was inappropriate to apply the *Penn Central* three prong taking test.

In *Webb's*, the purchaser of the assets of an insolvent business brought an interpleader action under Florida's bulk sales law to protect itself against claims of the seller's creditors. As required by the bulk sales law, the purchaser deposited the purchase price with the clerk of courts to hold it for those entitled to it. The Clerk, as required by statute, invested the money in an interest-bearing bank account. Later, the clerk turned the purchase price over to a receiver for the creditors, less a statutory service fee, but without the interest earned on the funds. This Court held that under Florida law the deposited money was private property while held by the Clerk of Courts and ownership of the interest followed ownership of the principal; and, that the failure to turn over the interest to the receiver was a taking.

The Florida Supreme Court had held that the deposited money is "considered 'public money'" from the date of deposit until it left the account and, construing the statute that required the clerk to invest the fund, held "there is no unconstitutional taking because the interest . . . is not private property." 449 U.S. at 158-159. This Court disagreed and unanimously held:

> "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court. The earnings of the fund are incidents of ownership of the fund itself and are property just as the fund itself. The state statute has the practical effect of

appropriating for the county the value of the use of the fund for the period in which it is held on the registry.

"[A] state, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That clause stands as a shield against arbitrary use of governmental power." 449 U.S. 164.

This case is on all fours with *Webb's*. STRS statutes: 1) require a teacher to deposit her own money in a government owned entity, the STRS; 2) place temporary possession, control and use of the money exclusively in an STRS trust fund for the sole benefit of the depositor until it is withdrawn or applied to fund an annuity; 3) require the STRS to invest the money while in its possession; and, 4) require the STRS to keep the net earnings on the deposited money when it is returned to the teacher.[9]

Under universal trust law, a teacher has equitable ownership of her contributions during the time they are held by the STRS. *Restatement of Trusts, Second*, Section 2, Illustration 2, comments f and h. Under Ohio law, earnings and gains on the teacher's equitable interest in her contributions belong to the teacher. *Eshelby*, supra. Applying Webb's to this case, the STRS temporarily takes teacher contributions and permanently takes the earnings and gains on the teacher's equitable interest therein. The result is the same even if there is no trust, for teacher contributions are held only for the teacher's benefit and for no other purpose, as was the

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[9] Just as the depositor in *Webb's* paid a statutory service fee to the holder of the funds, a teacher pays the STRS for the cost of operating the Plan, because the interest rate credited on contributions is based on expected earnings of the fund, less costs of operating it and a discount for the risk that the fund might earn less than expected.

case with the purchase price in *Webb's* where it was not claimed the funds were held in trust.

To avoid the Takings Clause, the Ohio Supreme Court said that in contrast to *Webb's*, interest on teacher contributions were a mere unilateral expectation and teacher contributions result from economic legislation designed to benefit teachers and their beneficiaries. *It then proceeded to do the very thing this Court ruled improper in Webb's.* It recharacterized the private property contributed by a teacher and the interest thereon as public property when received by the STRS by ruling that:

> " . . . mandatory teacher contributions . . . when placed in the fund, lose their character as private property. . . . [R]efunds are statutory benefits. . . . Accordingly, the nature and extent of a contributor's protected property rights in the STRS are determined solely by the statutes that govern the system." A12.

The Court said nothing about the earnings on Mrs. Horvath's contributions or its holding in *Eshelby* that the earnings on the principal belong to the owner of the principal.

In support of its erroneous recharacterization of Mrs. Horvath's contributions as public property, the Ohio Supreme Court cited only one Plan provision, R.C. 3307.03, and stated that while the funds in the teachers' savings fund superficially resemble annuities, separate teacher accounts are required by R.C. 3307.19 only for the purpose of calculating benefits. A12. In doing so, the Court ignored several statutes and made a mockery of the plain meaning of several others.

R.C. 3307.15(A), .19, .65 (A) and .66, require the STRS not merely to credit a teacher's contributions and the interest thereon to an account in her name. It also requires the STRS to segregate them from the rest of STRS assets by placing them in a separate legal trust fund, of which Respondent is the

Trustee. The Ohio Supreme Court ignored the trust fund creating language in these statutes. Placing teacher contributions in a separate legal trust fund is totally unnecessary to enable the STRS to calculate benefits, or even refunds of contributions. Mere accounts or internal records are adequate.[10] The only reason for creating a separate legal trust fund to hold teacher contributions is to legally establish that teacher contributions are the equitable property of the teacher.

The STRS statutes relating to benefits, withdrawals and refunds also treat teacher contributions as the property of the teacher. Those contributions must be applied only to fund the teacher's retirement benefits or they must be returned to the teacher or her beneficiary. No provision of the Plan purports to dedicate a teacher's contributions or any interest credited to her account to the general operation or financing of the Plan or to fund someone else's benefits.

The Ohio Supreme Court notwithstanding, Chapter 3307 does not characterize teacher contributions as "statutory benefits" subject to vesting requirements. R.C. 3307.46 and .48(B) state that a former teacher who applies for a withdrawal or a beneficiary of a teacher who dies "shall be paid" the accumulated contributions in her account. Those statutes do not state that the teacher or beneficiary shall be "granted" or "receive" a "benefit" or "allowance" as do the retirement, disability and survivor benefit provisions of R.C. 3307.38, .43 and .49(C).

The annuity language of R.C. 3307.38, .65(A), and (C) cannot be dismissed as "superficial." Those statutes expressly treat teacher contributions as advance payments to be held in

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[10] For example, the STRS had no trouble computing from its records the benefit Mrs. Horvath would have received had she not died, even though her post-1959 interest, essential to compute her benefit, had not been credited to her account.

trust in a "savings" fund and converted, with interest, into a defined contribution annuity for the teacher (augmented by a defined benefit employer funded pension of equal amount or more); or, refunded under R.C. 3307.46 or .48(B). These statutes express that a teacher has more than a "mere unilateral expectancy" in her contributions; they bilaterally acknowledge that she is the equitable owner of her "savings".

Within the last year, in *Phillips v. Washington Legal Foundation*, 118 S.Ct. 1925 (1998), this Court reaffirmed the lesson in *Webb's*, as follows:

> "[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." 118 S.Ct. at 1931.

There is no doubt in this case that the Ohio Supreme Court sidestepped the Takings Clause by disavowing traditional property law of Ohio regarding trusts and ownership of earnings by the owner of the principal.[11]

III. THE ISSUE IN THIS CASE IS IMPORTANT BECAUSE THE OHIO SUPREME COURT'S DECISION DENIES CONSTITUTIONAL PROTECTION TO THE RIGHTS OF PARTICIPANTS IN PUBLIC EMPLOYEE PENSION PLANS, VALIDATES A FUNDAMENTALLY UNUST PROVISION REJECTED EVERYWHERE AND CREATES CONFUSION REGARDING THIS COURT'S TESTS FOR DETERMINING WHETHER A TAKING HAS OCCURRED.

The holding of the Ohio Supreme Court, expressed in Syllabus 1 to its opinion, states that "the nature and extent of a contributor's property rights in the . . . [STRS] are determined

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[11] The Ohio Supreme Court cited the Ohio Constitution as a source of the legislature's power to fashion public employee pension plans. Needless to say, the Ohio Constitution is subservient to the federal Takings Clause.

solely by the statutes that govern the system." (Emphasis added.) The genesis of its holding was approval of *Kodish,* which, in turn, had relied on *Mell v. State,* 130 Ohio t. 306, 199 N.E. 72 (1935). In that case, the Ohio Supreme Court validated the reduction of a pension after it had been granted to a fireman by holding:

> "A pension granted by public authorities is a gratuitous rather than a vested or contractual right." Id. at 306 (Syllabus 1).
>
> "[A] pensioner has no vested right in the continuance of a gratuitous allowance[,] . . . even where . . . [the] pensioner has made compulsory contributions to the fund." Id. At 309, 199 N.E. at 73.

This case involves the right to contributions and interest, not the right to benefits. However, under this case and the above decisions, the Ohio legislature has unfettered plenary power to do as it pleases with all five of Ohio's public employee pension plans described below. It could, with impunity, not only deny interest on or refunds of contributions; it could repeal all five public employee plans, terminate all outstanding public employee pensions and transfer to Ohio's general fund all the assets of those plans - now over $50 billion for the STRS and probably over $100 billion for all five plans. Such absolute legislative power over the forced retirement savings of public employees and the benefits they have earned by working for the government cannot be just. It must be subject to the Bill of Rights.

This case now involves only Petitioner and some 250,000 others who have not received an estimated $54 million of interest from the STRS up to 1993. See footnote 4. However, it also affects Ohio's four other public employee pension plans covering school employees, public employees, policemen and firemen and highway patrol officers. Each of those plans has

a no-interest statute[12] In the past, a large number of Ohio citizens – probably over 1,000,000 - have suffered losses totaling hundreds of millions. In the future, thousands per year will suffer losses under the four no-interest statutes.

This case also has nationwide impact. Failure of this Court to grant certiorari and reverse the Ohio Supreme Court would send a message nationwide that public employees do not have federal Bill of Rights protection for their pension savings and accruals. Even States that consider their pension plans subject to constitutional limits could be emboldened to apply this case to stop making refunds of contributions and interest or make other unjust plan changes.

The No-interest Statute is fundamentally unjust. It is inherent in our economic and legal system that when a person uses another's money, he pays for the use, unless there is a voluntary agreement not to pay or a gift is intended. Accordingly, insurance companies pay interest on refunded annuity premiums. All financial institutions pay interest on deposits. Borrowers pay interest. Businesses offer the opportunity to receive dividends or make a gain. *No one in her right mind voluntarily invests her money in a retirement plan or any other investment that does not pay or provide the opportunity for a return.* It is patently confiscatory and unconscionable for Ohio to force its employees to do so.

It is not surprising, therefore, that of the 48 States with plans requiring teacher contributions, only three – Ohio, Louisiana and Rhode Island – do not pay interest on withdrawals. A68.

In 1974, Congress required payment of interest or its equivalent on withdrawn contributions by private employer pension plans nationwide when it enacted the Employee

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[12] R.C. 3309.01(I)(1), 145.01(I)(1), 742.37(G) and 5505.19 and .21.

Retirement Income Security Act of 1974. ("ERISA") 29 U.S.C. 1053(a)(1) and 1054(c)(2)(A),(B) and (C). A66. Congress exempted government plans, such as STRS, from ERISA, not because Congress felt public employees do not deserve its protections, but because the States lobbied to be trusted under to do the right thing on their own. Over 24 years since ERISA was enacted, Ohio has not carried out that trust. It is grossly unjust to deny to public employees the protections against employer misappropriation of pension savings and earnings that all private employees enjoy.

The Ohio Supreme Court's interpretation of *Penn Central, Loretto, Connolly* and *Webb's* muddies up this Court's tests for determining whether a taking has occurred. The Ohio Supreme Court does not acknowledge the difference between police power regulations and actual mandated transfer of possession of property. Instead, it differentiates between "economic programs", even if they include a transfer of possession of property, as coming under the three-prong *Penn Central* test and "traditional takings" involving permanent occupation of real property as not requiring an examination of the public benefit or economic impact on the owner. Also, without analysis, it mischaracterizes a public employee pension plan as an economic program to bring it under *Penn Central.*

In rejecting *Webb's*, the Ohio Supreme Court tried to put that case in a small pigeon-hole labeled "applies to interpleader deposits only". It doesn't matter whether the holder of the funds is a fiduciary or in what kind of transaction the deposit is required or why or when the funds must be returned. The critical fact in *Webb's*, and in this case, is that the State compels an individual to deposit his money with the government for a period of time for the benefit of the depositor herself, during which time the depositor is deprived

of all use of her money and permanently deprived of the earnings thereon.

CONCLUSION

The similarities between *Loretto* and *Webb's* and this case have been demonstrated. However, it is a difference between those two cases and this one which underscores the need to grant certiorari. *Loretto* and *Webb's* involved arms length relationships in the marketplace, deserving of takings protection, to be sure. But, this case involves a closer more caring and trusting relationship: that of a public employer and its employee, with the employer having almost absolute power to dictate most of the financial terms of the relationship. The employer uses a pension plan to secure loyal, long service from its employees. In exchange, the employees look to the employer to treat them fairly in accordance with the compensation standards of the community, particularly since public employees have relatively modest salaries, with no stock options or similar opportunities to accumulate retirement assets. Under these circumstances, not paying interest on refunded retirement savings extracted out of the employee's salary is an indefensible exercise of power beneath the dignity of government.

This Court should grant certiorari to correct the mistakes of the Ohio Supreme Court and to insure the proper application of this Court's taking decisions.

Respectfully submitted,

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JUDGMENTS AND OPINIONS ENTERED IN CONNECTION WITH THE JUDGMENT SOUGHT TO BE REVIEWED

Judgment of the Ohio Supreme Court

The Supreme Court of Ohio

FILED
AUG 19 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

1998 TERM

State ex Rel. Theodore J. Horvath, Appellant,	:	Case No. 97-1197
v.	:	JUDGMENT ENTRY
The State Teachers Retirement Board, Appellee.	:	APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals fdor Franklin County for entry.

COSTS:

Docket Fee, $40.00, paid by Theodore J. Horvath.

(Franklin County Court of Appeals; No. 96APE08983)

/s/
THOMAS J. MOYER
Chief Justice

Opinion of the Ohio Supreme Court

THE STATE EX REL. HORVATH, APPELLANT, *v.* STATE TEACHERS RETIREMENT BOARD, APPELLEE.

Teachers – State Teachers Retirement system – Nature and extent of contributor's protected property rights in the STRS are determined soley by statutes that govern the system – Public school teachers possess contract rights in any STRS benefit, when.

1. Mandatory teacher contributions to the State Teachers Retirement System result from economic legislation designed to benefit retired and disabled public school teachers and their survivors and beneficiaries and, when placed in the fund, lose their character as private property. Accordingly, the nature and extent of a contributor's protected property rights in the State Teachers Retirement System are determined soley by the statutes that govern the system.
2. Public school teachers do no possess contract rights in any State Teachers Retirement System benefit unless and until the benefit vests by operation of R.C. 3307.711.

(No. 97-1197 - Submitted May 13, 1998 - Decided

August 19, 1998.)

APPEAL from the Court of appeals for Franklin County,

No. 96APE08-983.

Appellant, Theodore J. Horvath, initiated this action for declaratory judgment, mandamus, and injunctive relief to recover interest on mandatory contributions to the State Teachers Retirement System ("STRS") made by his wife, Sydney Horvath, while publicly employed as an art teacher between 1951 and 1964. Although Mrs. Horvath never resumed her career as a public school teacher, she left her contributions in the fund until her death at age fifty-nine in June 1989. At the time of Mrs. Horvath's death, R.C. 3307.651 had taken effect to permit the crediting of interest on teacher contributions after august 31, 1959 only upon retirement, and only in the event that the sum in the account at retirement is a factor in determining the allowance. R.C. 3307.651(2) and (3). Because Mrs. Horvath died before she became eligible to retire, the State Teachers Retirement Board ("Board") refunded Mr. Horvath only $4540.51 - the sum of her contributions, with no interest. Accordingly, Mr. Horvath calculates that R.C. 3307.651(2) and (3) work to deny him interest in the amount of $29,435.55 accrued in his wife's contributions after august 31, 1959.

Throughout these proceedings, Horvath has urged invalidation of R.C. 3307.651(2) and (3) on grounds that those provisions (1) effect an unconstitutional taking under the Ohio and United states Constitutions, (2) deny equal protection under the Ohio and United States Constitutions, (e) violate the Contact Clauses of the Ohio and United States Constitutions, and (4) impose contract provisions that are unfair and unconscionable. In response, appellee, STRB, has refuted Horvath's challenges and asserted affirmative defenses of equitable estoppel, waiver, and laches. In the proceedings

below, the common pleas and appellate courts upheld the statutory provisions against Horvath's attacks. The cause is now before this court pursuant to the allowance of a discretionary appeal.

Theodore J. Horvath, pro se; Chattman, Gaines & Stern Co., L.P.A., Thomas C. Wagner and *Sara J. Moore*, for appellant.

Betty D. Montgomery, Attorney General, and *Michael Gleespen*, Assistant Attorney General, for appellee.

COOK, J. For the reasons stated below, we reject Horvath's challenges to R.C., 3307.651 and determine that he is not entitled to post-1959 interest on his wife's contributions.

I. R.C. 3307.651(3)

From the inception of this action, Horvath's arguments have lumped together R.C. 3307.651(2) and 3307.651(3) and referred to them collectively as the "no-interest" statute. In this appeal, Horvath continues to assert that we should invalidate both statutory divisions. Scrutiny of Horvath's claims, however, reveals that only R.C. 3307.651(2) is truly at issue in this case.

R.C. 33076.651(2) delays crediting of interest on STRS members' accumulated contributions until retirement. R.C. 3307.651(3) applies to retirees and provides that interest is credited to the retiree's account only if the amount of the account at retirement is a factor in determining a retirement allowance. Because Horvath's claim involves only the right to a beneficiary to a refund of interest earned on a member's accumulated contributions under former R.C. 3307.48(B) when a member dies before becoming eligible to retire, R.C. 3307.651(3) is never placed in issue. Accordingly, the

remainder of this opinion analyzes only Horvath's arguments with respect to R.C. 3307.651(2).

II. TAKINGS

Horvath argues that R.C. 3307.651(2) results in an unconstitutional taking of private property in violation of the Fifth Amendment of the United States Constitution and Section 19, Article I of the Ohio Constitution. Horvath likens STRB's retention of the interest accrued on his wife's mandatory STRS contributions to the "physical occupation of property" analyzed by the United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 434, 102 S.Ct. 3164, 3175, 73 L.Ed.2d 868, 882. Accordingly, Horvath cites *Penn Cent. Transp. Co. v. New York* (1978), 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648, in urging that "it is inappropriate and unnecessary to examine the character or purpose of [R.C. 3307.651(2)] or its benefit to the public, economic impact on a teacher or interference with her reasonable investment expectations or whether it fairly adjusts 'the benefits and burdens of economic life to promote the common good.'"

A review of the Supreme Court's takings jurisprudence, however, demonstrates that the very factors Horvath wishes this court to ignore are those with the most relevance to this case. *Loretto* is quite dissimilar to this case. *Loretto* involved a *permanent physical occupation of real property*: state legislation permitted cable television carriers to permanently affix access lines and other facilities to apartment buildings and severely limited the landlord's recompense for the intrusion. *Id.* 458 U.S. at 422-425, 102 S.Ct. at 3168-3170, 73 L.Ed.2d at 873-875. Because governmental action involving permanent physical occupation of real property is of such a character as to itself carry the traditional takings inquiry, the *Loretto* court held that there was no reason to further analyze the public benefit of the governmental action

or its impact on the property owner. *Id.* at 434-438, 102 S.Ct. at 3175-3177, 73 L.Ed.2d at 881-884. As we discuss below, the most important distinctions between *Loretto* and this case are that (1) the governmental action in this case is not a physical occupation of private property for its own use, and (2) ultimately, Mrs. Horvath possessed no property right to interest in her STRS contributions.

At the outset, we think it necessary to announce the common purpose behind the United States and Ohio Takings Clauses. Those constitutional guarantees are "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'" *Penn Cent. Transp. Co. v. New York*, 438 U.S. at 123, 98 S.Ct. at 2659, 57 L.Ed.2d at 648, quoting *Armstrong v. United States* (1960), 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554, 1561. In conjunction with this design, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., *United States v. Causby*, 328 U.S. 256 66 S.Ct. 1062, 90 L.Ed. 1206] (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. "*Penn Cent.*, 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648.

On this issue, we draw comparison to *Connolly v. Pension Benefit Guar. Corp.* (1986), 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed2d 166. In *Connolly*, the United States Supreme Court reasoned that legislation forcing an employer to fund its share of obligations incurred during voluntary association with a multiemployer pension plan did not constitute a taking. In addressing the nature of the government action, the court noted that "the government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in

multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation." *Id.* at 225, 106 S.Ct. at 1026, 89 L. Ed.2d at 179.

Similarly, in this case, Mrs. Horvath's contributions to the STRS were used to benefit STRS participants – a subset of the public that included her. As we discuss later, STRS itself adjusts the benefits and burdens of providing public school teachers with retirement, death, and disability benefits among public school teachers and their employers. While the state may derive an indirect benefit from this use in that the STRS benefits publicly employed school teachers, that indirect benefit does not equate with physical invasion or permanent appropriation of the assets of fund participants for its own use. Accordingly, the analysis employed in *Loretto*, involving a permanent physical occupation of real property, is inapposite to this case.

Having rejected Horvath's attempt to analogize this case to *Loretto*, we now turn to the traditional takings inquiry set forth by the court in *Penn Cent.* Although the *Penn Cent.* Court noted that the traditional takings inquiry requires an *ad hoc* analysis depending largely on the circumstances of a particular case, it listed the following factors as having particular significance: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Id.* 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648. We previously analyzed the character of governmental action in this matter as being similar to the economic legislation

considered in *Connolly* and dissimilar to the physical invasion considered in *Loretto*, and now confirm that our analysis of that issue weighs against the finding of a taking. Accordingly, we proceed to analyze the economic impact of the regulation on Mrs. Horvath and her investment-backed expectations in her STRS contributions.

In analyzing the severity of the economic impact of R.C. 3307.651(2), we cannot discount, as does Horvath, the benefits that he and his wife could have received under the STRS had certain events occurred. See *Connolly*, at 475.U.S. at 225-226, 106 S.Ct. at 1026-1027, 89 L. Ed.2d at 179-180. Instead, potential benefits unrealized by the Horvaths are nevertheless to be considered as offsetting the STRS' ultimate adverse impact on the Horvaths. For instance, had Mrs. Horvath lived to retirement age, she would have drawn a pension, based on her contributions or her final average salary or a minimum amount far exceeding her total contributions and accumulated interest. See former R.C. 3307.38(B) and (C) (providing alternative methods of calculating service retirement benefits), 143 Ohio Laws, Part III, 4124-4125. Moreover, STRS funded various benefits that either applied to Mrs. Horvath during her service as a public school teacher or that would have become available to her upon retirement. See, e.g., G.C. 7896-38 (disability benefits) and 7896-41a(b) (survivor benefits), 124 Ohio Laws 643 and 647; the versions of R.C. 3307.43 (disability benefits) and 3307.49(B) (survivor benefits) in effect during Mrs. Horvath's period of service, e.g., 127 Ohio Laws 326 and 330; and versions of R.C. 3307.38 (service retirement benefits) 143 Ohio Laws, Part III, 4124 (lump sum payment upon death), 143 Ohio Laws, Part III, 4125, R.C. 3307.405 (Medicare equivalent benefits), 136 Ohio Laws, Part I, 1281, and R.C. 3307.49(A) (survivor benefits), 142 Ohio Laws, Part I, 1186, in effect on January 31, 1990 – the date Mrs. Horvath would have become eligible for retirement. Finally, in this case, any adverse economic

impact is minimized be the option available to Mrs. Horvath when she left teaching to withdraw her contributions and invest that money on her own, and the ultimate refunding of Mrs Horvath's base contributions upon her death. R.C. 3307.46 (all versions); former R.C. 3307.48(B), 136 Ohio Laws, Part II, 2139 (in effect at the time of Mrs. Horvath's death).

In Mrs. Horvath's case, failure to reach retirement age caused her potential STRS benefits to remain unrealized. Nevertheless, Mrs. Horvath's forfeiture of the interest earned on her contributions is not disproportionate to the benefits available to her under the plan, whether actually realized or not. Thus, the second takings factor of the *Penn Cent.* test is not in Horvath's favor. Compare *Connolly*.

Finally, in considering the Horvaths' reasonable investment-backed expectations, we note that, from R.C. 3307.651's effective date in November 1965 [*sic* 1959] to R.C. 3307.80's effective date in March 1997,[1] teachers who did not meet t he eligibility requirements for retirement were not entitled to interest on their contributions. Nevertheless, it is for substantially this same period of time that Horvath argues interest should have accrued and been credited to his wife's account. Accordingly, the Horvaths' expectations of receiving interest on STRS contributions did not reasonably continue after R.C. 3307.651 became effective.

Moreover, courts construing the investment-backed expectation factor of the *Penn Cent.* triad have concluded that its purpose is "to limit recovery to owners 'who could

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[1] In 1996, the General Assembly enacted R.C. 3307.80, effective March 31, 1997, as part of Am.Sub.H.B. No. 586, mandating payment of interest on members' accumulated contributions in the event of death or withdrawal from the system before vesting. Appellant does not argue that R.C. 3307.80 applies to his situation, nor does this appeal involve a claim regarding disparate treatment of those who receive the benefit of R.C. 3307.80 and those who do not.

demonstrate that they bought their property in reliance on a state of affairs *that did not include the challenged regulatory regime*.'" (Emphasis added.) *Allen v. Cuomo* (C.A.2, 1996), 100 F.3d 253, 262, quoting *Loveladies Harbor, Inc. v United States* (Fed.Cir.1994), 28 F.3d 1171, 1177. This conclusion seems grounded in the long-standing principle that "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit" *New York Cent. RR. Co. v. White* (1917), 243 U.S. 188, 198, 37 S.Ct. 247, 250, 61 L.Ed. 667, 672. As noted by one legal commentator, and cited with approval by the United States Supreme Court in *Landgraf v. USI Film Prods.* (1994), 511 US. 244, 270, 114 S.Ct. 1483,1499, 128 L.Ed.2d 229, 255, fn. 24, "[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." Fuller, The Morality of Law (1964) 60. See, also, *Branch v. United States* (Fed.Cir.1995), 69 F.3d 1571, 1578. Because the record contains no indication that the Horvaths possessed a reasonable investment-backed expectation to interest on STRS contributions made after August 1959, this factor also weighs against finding a taking.

Having failed the *Penn Cent.* takings analysis, Horvath's claim is not saved by his analogy to *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980), 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358. Unlike our previous takings discussion, which treated Mrs. Horvath's mandatory contributions and the interest accrued thereon as a single, indivisible unit (see *Phillips v. Washington Legal Found.* (1998), ___ U.S. ___, 118 S.Ct. 1925, 1937-1939, ___ L.Ed.2d ___, ___ (Breyer, J., dissenting), Horvath's argument under *Webb's* focuses solely on his wife's property right to earned interest as an incident of ownership of the account set up in her name pursuant to R.C. 3307.19. While Horvath's argument supposes a constitutional property right to interest earned on the STRS contributions

Webb's makes it clear that any property right to interest on contributions would have to be a product of some source independent of the federal Constitution, such as state law. "'[P]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law ....' *Board of Regents v. Roth*, 408 U.S. 564, 577 [92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561] (1972). But a mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Webb's*, 449 U.S. at 161, 101 S.Ct. at 451, 66 L.Ed.2d at 364.

The teacher's savings fund of the STRS is much different from the interpleader fund considered in *Webb's*. The interpleader fund at issue in *Webb's* was private property held for the ultimate benefit of *Webb's* creditors. To that fund, the court applied the "usual and general rule *** that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of the principal." *Webb's*, 449 U.S. at 162, 101 S.C. at 451, 66 L.Ed.2d at 365. The *Webb's* court rejected the suggestion that sums placed in the interpleader fund became "public money" upon deposit until they left the account, instead stressing that sums placed in the interpleader fund remained private property, despite the fact that creditors lacked an immediate right to its proceeds. See, also, *Phillips*, ___ U.S. at ___, 118 S.Ct. at 1930, ___ L.Ed.2d at ___ (noting that all the parties to that appeal agreed that the principal held in IOLTA trust accounts is the client's "private property"). Additionally, the *Webb's* court was careful to note that the statute at issue was not one adjusting "'the benefits and burdens of economic life to promote the common good.'" *Webb's*, 449 U.S. at 163, 101 S.Ct. at 452, 66 L.Ed.2d at 366, quoting *Penn Cent.*, 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648.

In contrast to the interpleader fund in *Webb's*, mandatory teacher contributions to the STRS result from economic legislation designed to benefit retired and disabled public school teachers and their survivors and beneficiaries[2] and, when placed in the fund, lose their character as private property. See R.C. 3307.03. Grants made from STRS funds, including refunds drawn from the teachers' savings fund pursuant to R.C. 3307.48(B) and 3307.46, constitute statutory benefits. See *Kodish v. Pub. Emp. Retirement Bd.* (1975), 45 Ohio App.2d 147, 153, 74 O.O.2d 167, 170-171, 341 N.E.2d 320, 324. Accordingly, the nature and extent of a contributor's protected property rights in the STRS are determined solely by the statutes that govern the system. See *Crown v. Patrolman's Variable Supplements Fund Trustees* (S.D.N.Y.1987), 659 F.Supp. 318, 320, affirmed (C.A.2, 1987), 819 F.2d 47.

Granted, funds held in the teachers' savings fund superficially resemble personal annuities in that R.C. 3307.19 requires the STRB to maintain separate accounts for each contributing teacher, showing both the teacher's contribution and interest accumulated thereon. The overall STRS scheme, however, requires these records to be kept only for purposes of calculating the benefits defined in R.C. Chapter 3307 that are granted upon retirement, death, disability, or voluntary withdrawal upon cessation of teaching.

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[2] Economic legislation related to the welfare of employees, including pension funds for public employees, is granted favored status under Section 34, Article II of the Ohio Constitution, which states: "Laws may be passed funding and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power." Pursuant to this provision, our court has upheld the creation, administration, management and control of public pension funds against wide-ranging constitutional attacks. See *State ex rel. Bd. Of Trustees of Police & Firemen's Pension Fund v. Bd. of Trustees of Police Relief & Pension Fund* (1967), 12 Ohio St.2d 105, 41 O.O.2d 410, 233 N.E.2d 135.

R.C. 3307.651(2) and 3307.711 combine to credit interest on contributors' accounts upon retirement in order to calculate the retiree's retirement allowance, annuity, or pension. Former R.C. 3307.48(B) created a statutory right in favor of Mr. Horvath to have his wife's contributions refunded to him upon her death. By operation of R.C. 3307.651(2), however, that right did not include interest accrued on Mrs. Horvath's contributions. Because neither Mrs. Horvath as a member of STRS nor Mr. Horvath as her beneficiary ever possessed a vested property right to interest accrued on her STRS contributions, there was no taking under our state or federal Constitutions.

III. EQUAL PROTECTION

Horvath proposes that the unequal treatment by R.C. 3307.651(2) of teachers who retire and those who do not violates the Equal Protection Clauses of the United States and Ohio Constitutions. Horvath does not argue the presence of a suspect class or fundamental right but simply argues that there is no rational basis supporting the disparate treatment of retirees and nonretirees. We disagree.

As stated in *State ex rel. Nyitray v. Indus. Comm.* (1983), 2 Ohio St.3d 173, 175, 2 OBR 715, 717, 443 N.E.2d 962, 964, "[e]qual protection of the laws requires the existence of reasonable grounds for making a distinction between those within and those outside a designated class. The 'reasonableness' of a statutory classification is dependent upon the purpose of the Act." (Citations omitted.) The makeup of the classes identified by Horvath is itself telling. Eligibility for retirement is based on an aggregate of two factors: age and service time. Accordingly, classification of members into groups of retirees and nonretirees furthers the apparent purpose of STRS of protecting elderly and long-serving public school teachers with adequate retirement benefits.

Because the statutes set apart retirees as a class that STRS is chiefly designed to benefit, it logically follows that nonretirees will not be entitled to the same treatment. When the legislature moved STRS from a defined-contribution plan toward a defined benefit plan. the nature of the system changed to guarantee benefit levels upon retirement-shifting the investment risk away from the individual contributor.[3] In order to help fund guaranteed benefit levels, the legislature opted to reduce the benefits of those who fail to qualify for retirement by refunding to the contributor or beneficiary only accumulated contributions, without crediting interest on those contributions. Former R.C. 3307.46, former R.C. 3307.48, and R.C. 3307.651.

"[L]egislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" *Rinaldi v. Yeager* (1966), 384 U.S. 305, 309, 86 S.Ct. 1497, 1499-1500, 16 L.Ed.2d 577, 580, quoting *Baxstrom v. Herold* (1966), 383 U.S. 107, 111, 86 S.Ct. 760, 763, 15 L.Ed.2d 620, 624. Classifications having a reasonable basis do "not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams* (1970), 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed. 491, 501-502, quoting *Lindsley v. Natural Carbonic Gas Co* (1911), 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369, 377. Because a rational basis underlies disparate treatment of

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[3] The 1951 amendment effected by Am.Sub.S.B. No. 96, 124 Ohio Laws 640, added a minimum benefit limited by the final average salary to G.C. 7896-35, and the 1965 amendment to R.C. 3307.38 enacted in Am.Sub.H.B. No.225, 131 Ohio Laws 712, allows retirees to receive greater benefits calculated under alternative formulas: one based primarily on service credit and the member's final average salary, the other based primarily on the members accumulated contributions.

public school teachers who meet retirement eligibility and those who do not, there is no equal protection violation.

IV. CONTRACT CLAIMS

A. Contract Clauses

Next, Horvath argues that R.C. 3307.651(2) creates an unconstitutional impairment of contract in violation of Clause 1, Section 10, Article I of the United States Constitution and Section 28, Article II of the Ohio Constitution. Again, we disagree.

Essentially, Horvath argues that, at the time Mrs. Horvath started working, the STRS created a contractual obligation to pay interest on her STRS contributions that could not later constitutionally be altered by statute. In analyzing whether a statute violates the Contract Clause, "[g]enerally, we first ask whether the change in state law has 'operated as a substantial impairment of a contractual relationship.'" *Gen. Motors Corp. v. Romein* (1992), 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328, 337, quoting *Allied Structural Steel Co. v. Spannaus* (1978), 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727, 736. "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Romein*, 503 U.S. at 186, 112 S.Ct. at 1109, 117 L.Ed.2d at 336.

In determining whether a contractual relationship exists in the first instance, we are mindful that a state legislative enactment may be deemed a contract for purposes of the Contract Clause only if there is a clear indication that the legislature has intended to bind itself in a contractual manner. *Natl. RR. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.* (1985), 470 U.S. 461, 465-466, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432, 445-446. Accordingly, we begin with a presumption that, absent a clearly stated intent to do so,

statutes do not create contractual rights that bind future legislatures. *Id.* Courts have coined the phrase "unmistakability doctrine" for this legal principle. See, e.g., *McGrath v. Rhode Island Retirement Bd.* (C.A.1, 1996), 88 F.3d 12, 19, citing *United States v. Winstar Corp,* (1996), 518 U.S. 839, 116 S.Ct. 2432, 185 L.Ed.2d 964. The requirement inherent in the unmistakability doctrine that "'the government's obligation unmistakably appear thus serve[s] the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power.'" *Parker v. Wakelin* (C.T.1, 1997), 123 F.3d 1, 5, quoting United States v. Winstar Corp., 518 U.S. at 875, 116 S.Ct. at 2455, 135 L.Ed.2d. at 991. The unmistakability doctrine is useful not only in determining whether a contractual relationship exists, but also in "defining the contours" of any contractual obligation that is found to exist. *Atchison*, 470 U.S. at 466, 105 S.Ct. at 1452, 84 L.Ed.2d at 446.

Our early cases categorized pensions granted to public servants as mere gratuities, which were not to be equated with contractual rights. Accordingly, pension boards were free to modify pension awards, provided that modifications were done reasonably and not arbitrarily. *Mell v. State ex rel. Fritz* (1935), 130 Ohio St. 306, 309, 4 0.0. 320, 321-322, 199 N.E. 72, 73. In *State ex rel. Cunat v. Trustees of Cleveland Police Relief & Pension Fund* (1948), 149 Ohio St 477, 481-482, 37 O.O. 143, 145, 79 N.E.2d 316, 318, however, the court acknowledged that enactment of the "vested right" statutes placed pensions granted to public servants covered by a firemen's pension fund or a police relief fund in the category of unilateral contracts that, *upon conditions fullfilled*, ripen into a contractual right to a pension.

In 1955, the legislature added vesting language to the STRS similar to that contained in the vested rights statutes considered in *Cunat* by enacting R.C. 3307.711 as part of Am.H.B. No. 744, 126 Ohio Laws 1047. By its terms, R.C. 3307.711 vests a right to a retirement allowance, annuity, or pension at the time that benefit is granted by the STRB at the rate fixed by law when the benefit is conferred. Accordingly, under R.C. 3307.711, a right does not become vested until it is granted, and only grants of retirement allowances, annuities, and pensions give rise to vested rights. R.C. 3307.711 does not reach refunds of accumulated contributions under R.C. 3307.48(B) or R.C. 3307.46.

Outside of R.C. 3307.711, there is nothing in any version of the Act evincing an intent on the part of the General Assembly to bind itself contractually to STRS participants.[4] Moreover, there is nothing in the language of any of our statutes or our state Constitution creating a vested or contractual right to defined STRS benefit levels upon commencement of public employment, or barring legislative modification of benefits prior to vesting under R.C. 3307.711.[5]

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[4] Horvath cites R.C. 3307.58 in arguing that a teacher has contract rights in the STRS. That section provides:

"Each employer, before employing any, teacher to whom sections 3307.01 to 3307.72, inclusive, of the Revised Code, applies, shall notify such person of his duties and obligations under such sections as a condition of his employment.

"Any such appointment or reappointment of any teacher in the public day schools of the state, or service upon indefinite tenure, shall be conditioned upon the teacher's acceptance of such sections, as part of the contract."

That section, however, incorporates only the duties and obligations that R.C. Chapter 3307 imposes upon public school teachers into the teachers' individual employment contracts. It does not unmistakably bring the entire STRS scheme within the employment oontract.

[5] A number of states have provisions in either their constitutjons or statutes vesting public employees with their pensions upon commencement of their employment

We recognize that other states have found the deferred compensation aspect of a public pension to implicitly require vesting of the right to a pension at fixed and definite benefit levels upon acceptance of employment. See, e.g., *Betts v. Bd. of Administration of Pub. Employees' Retirement Sys.* (1978), 21 Cal.3d 859, 863, 148 Cal.Rptr. 158, 161, 582 P.2d 614, 617; *Sylvestre v. Minnesota* (1973), 298 Minn. 142, 155-156, 214 N.W.2d 658, 666-667; *Yeazell v. Copins* (1965), 98 Ariz. 109, 402 P.2d 541. Applying the unmistakability doctrine, however, we are unable to conclude that our legislature intended to confer contractual rights upon STRS participants aside from those that have vested by operation of statute. Compare *Spiller v. Maine* (Me.1993), 627 A.2d 613, 515-517 (statutes establishing pension benefits for state employees did not create contractual rights, and, thus, legislative modifications of prospective retirement benefits for state employees did not violate state and federal Contract Clauses); *Pineman v Oechslin* (1985), 195 Conn. 405, 414, 488 A.2d 803, 808 (retirement Act did not create vested contractual rights in favor of state employees before they became eligible for pensions, since there was no clear expression by legislature that the Act was intended to create such rights). Accordingly, consistent with our earlier opinions on the subject, we conclude that public school teachers do not possess contract rights in any STRS benefit unless and until the benefit vests by operation of R.C. 3307.711. See *Petras v. State Bd. of Pension Trustees* (Del.1983), 464 A2d 894, 896. We therefore hold that R.C. 3307.651(2) does not violate our state or federal Contract Clauses.

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and barring legislative modifications that retroactively reduce public employees' accrued benefits. *Parker*, 123 F.3d at 7 (listing Alaska Constitution, Section 7, Article XII; Hawaii Constitution, Section 2, Article XVI; Illinois Constitution, Section 5, Article XIII; Michigan Constitution, Section 24, Article IX; New York Constitution, Section 7, Article V; *Opinion of the Justices* (1978), 364 Mass. 847, 860, 303 N.E.2d 320, 327).

B. Conscionability

Horvath seeks to avoid application of R.C. 3307.651(2) by arguing that it is an unconscionable or unfair adhesion contract provision and therefore should be voided. In our previous discussion, we established that a contractual relationship between Mrs. Horvath and the state regarding the STRS never came into being, and further that any contractual rights or obligations that could arise out of R.C. 3307.711 would not extend to the right to a refund of a STRS participant's accumulated contributions under R.C. 3307.48(B), R.C. 3307.46, or any of those provisions' predecessors. Accordingly, there is no need to further analyze R.C. Chapter 3307 as a contract or its individual provisions as contract terms.

V. CONCLUSION

Because Horvath fails to demonstrate that R.C. 3307.651(2) suffers a constitutional infirmity or constitutes an unconscionable or unfair adhesion contract term, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., RESNICK, F.E. SWEENEY and LUNDBERG STRATTON, JJ., concur.

DOUGLAS, J., concurs in judgment only.

PFEIFER, J., dissents.

Judgment of the Court of Appeals

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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State ex rel. Theodore J. Horvath :
Relator-Appellant, :
No. 96APE08-983
v. :
(REGULAR
The State Teachers Retirement Board, : CALENDAR)
Respondent-Appellee, :

Journal Entry of Judgment

For the reasons stated in the opinion of this court rendered herein on April 29, 1997, appellant's first, second, third, and fourth assignments of error are overruled, and the fifth assignment of error is rendered moot, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellant.

BOWMAN, PETREE & LAZARUS, JJ.

By /s/
Judge Cynthia C. Lazarus

Opinion of the Court of Appeals

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Theodore J. Horvath,
Relator-Appellant,
No. 96APE08-983
v.
(REGULAR
The State Teachers Retirement Board, CALENDAR)
Respondent-Appellee.

OPINION
Rendered on April 29,1997

Theodore J. Horvath, pro se; Chattman, Gaines & Stern Co., L.P.A., Thomas C. Wagner and *Sara J. Moore*, for appellant.

Betty D. Montgomery, Attorney General, and *Michael W. Gleespen*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

LAZARUS, J.

Relator-appellant, Theodore J. Horvath, appeals from the judgment of the Franklin County Court of Common Pleas granting the motion to dismiss and/or motion for judgment on the pleadings of respondent-appellee, State Teachers Retirement Board ("STRB"). Horvath brought a class action against STRB challenging the validity of R.C. 3307.651(2)

and (3) (the "no interest statute").[6] The trial court denied class action certification under Civ.R. 23(B)(1)(a), and this court affirmed. *State ex rel. Horvath v. State Teachers Retirement Bd.* (Mar. 31, 1995), Franklin App. No. 94APE07-988, unreported (1995 Opinions 1461). Horvath pursued the action as the sole plaintiff.

The following facts, taken from the earlier appeal in this matter, are relevant to this appeal:

> "***Ohio established the State Teachers Retirement System ('STRS') to operate a pension plan for all Ohio public school teachers. Respondent, the State Teacher's Retirement Board, is charged with management of this plan. The plan's provisions and respondent's fiduciary

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[6] R.C. 3307.651 provides:

> "Interest compounded annually shall be credited to the accounts of members and to the various funds, and shall be assumed in determining actuarial factors, at rates recommended by the actuary and approved by the retirement board, but not less than three and twenty-five hundredths per cent effective September 1, 1965, except as follows:
>
> "(1) For the years stated the rates shall be as follows:
>
> | Years | Rates |
> |---|---|
> | 9-1-1920/8-31-1955 | 4.00% |
> | 9-1-1955/8-31-1963 | 3.00 |
> | 9-1-1963/8-31-1965 | 3.25 |
>
> "(2) Subsequent to August 31, 1959 interest shall be credited to accounts only at retirement.
>
> "(3) If the amount of the account at retirement is not a factor in determining the allowance, interest shall not be credited to such account after September 1, 1964.
>
> "(4) The actuary shall estimate the amount of interest reserve required in the teachers savings fund for credit to accounts when interest is to be a factor in determining the allowance, and the balance of the interest reserve in such fund shall be transferred to the employers trust fund as of September 1, 1965."

obligations in managing the plan are contained in R.C. Chapter 3307. Under the plan's provisions, every teacher in every publicly supported school in the state of Ohio is required to contribute to the plan an amount equal to 8 percent of his or her salary by means of payroll deduction. These contributions, and any interest credited thereon, are accumulated in the Teachers' Savings Fund of the STRS. These contributions and the earnings thereon are applied to pay monthly retirement benefits to teachers, monthly survivor benefits to beneficiaries of deceased teachers and to pay the expenses of administering the pension plan.

"Generally, a teacher who has at least 5 years of service credit under the STRS plan and has attained age 60, or who has at least 25 years of service credit and has attained age 55, or who has at least 30 years of service credit regardless of age is entitled to retire under the STRS plan and receive a monthly retirement benefit.

"The monthly retirement benefits of teachers who retire are computed under a formula based upon years of service and final average salary; the benefit may not be less than the sum of an annuity derived from the teacher's contributions with compound interest thereon to the date of retirement. A teacher with less than 5 years service who stops teaching for any reason, including death, is not entitled to any monthly retirement benefit, nor is the beneficiary of a deceased teacher entitled to any monthly survivor benefit. However, the teacher or beneficiary is entitled to withdraw whatever contributions the teacher may have made.

"A former teacher with at least 5 years of service credit remains eligible to receive a monthly retirement benefit upon satisfying the applicable age, but only if the former teacher leaves his or her contributions in the STRS plan. Similarly, the beneficiary of a deceased teacher with five

or more years service may elect a monthly survivor benefit or may withdraw the teacher's contributions.

"Each teacher's contributions are credited to his or her individual account maintained in the pension plan. Prior to September 1, 1959, the STRS was required to credit compound interest annually to each teacher's individual account on the accumulated contributions in that account. If a teacher or the beneficiary of a deceased teacher withdrew the teacher's contributions instead of receiving a monthly retirement or survivor benefit, the amount withdrawn included the interest credited to the teacher's account.

"In 1959, R.C. 3307.651(2) was amended to provide that after August 31, 1959, interest shall not be credited annually to each teacher's account. Instead, the aggregate amount of interest compounded, which otherwise would be credited to a teacher's individual account annually, shall be credited to his or her account in a lump sum at retirement. In 1964, R.C. 3307.65(3) was enacted to prevent the crediting of interest to a teacher's account unless the amount of the account at retirement is not a factor in determining the allowance. Consequently, after August 31, 1959, whenever a teacher or the beneficiary of a deceased teacher withdraws the teacher's contributions instead of receiving a monthly retirement or survivor benefit, the amount paid does not include any interest on the contribution because no interest was credited to the teacher's account.

"Relator is the husband and beneficiary of a former teacher who contributed approximately $4,500 to the plan in slightly less than 13 years of teaching. After leaving the teaching profession, relator's wife chose not to withdraw her contributions, but instead chose to leave her contributions in the plan in order to receive a monthly

retirement benefit after reaching age 60. Unfortunately, relator's wife died a few months before reaching the age of 60; thus, relator was not entitled to a monthly survivor benefit. Under the plan, relator was entitled to a refund only of the contributions made by his wife." *Id.* at 1463-1465.

In his complaint, appellant requested a declaratory judgment, a writ of mandamus, or a mandatory injunction. Appellant alleged that the no-interest statute was invalid because it impaired the obligation of contract in violation of Clause 1, Section 10, Article I, United States Constitution and Section 28, Article II, Ohio Constitution. Appellant also alleged that the statute was an unconscionable adhesion provision; that it created an illegal lottery in violation of Section 6, Article XV Ohio Constitution and R.C. 2915.02(A)(2); that it took property without just compensation in violation of Amendments V and XIV of the United States Constitution and Section 19, Article I, Ohio Constitution; that it denied equal protection of the laws between nonretiring and retiring teachers in violation of Amendment XIV of the United States Constitution and Section 2, Article I, Ohio Constitution; that it violated applicable provisions of federal pension law; and that it denied equal protection of the laws between nonretiring teachers and other Ohio residents who participate in pension plans covered by federal pension law.

On June 5, 1996, the trial court issued its decision and entry granting STRB's motion to dismiss and motion for judgment on the pleadings. The trial court held that the provisions of STRS did not create a contractual relationship and, therefore, the no-interest statute was not unconscionable, was not an illegal lottery, and did not impair the obligation of contract. The court also held that the no-interest statute did not violate the equal protection and the takings provisions of the United States and Ohio Constitutions, and was not a

violation of federal pension law. In addition, the court ruled that appellant's claims were barred by the doctrines of equitable estoppel, waiver, and laches.

A judgment on the pleadings may be granted pursuant to Civ.R. 12(C) in an action for a declaratory judgment where there exists no material issue of fact and one party is entitled to a declaration in his favor as a matter of law. *Calhoun v. Supreme Court of Ohio* (1978), 61 Ohio App.2d 1, at 5. An action for a declaratory judgment should not be dismissed unless there is no real controversy between the parties, or when a declaratory judgment will not terminate the uncertainty or controversy between the parties. In all other cases the court must determine the rights and/or relationships of the parties. *Fiorsi v. State Farm Mut. Auto Ins. Co.* (1985), 26 Ohio App.3d 203.

On appeal, appellant brings the following five assignments of error:

"1. THE TRIAL COURT ERRED IN HOLDING THAT THE STATE TEACHERS RETIREMENT SYSTEM PENSION BENEFITS CREATED IN ORC CHAPTER 3307 ARE MERE GRATUITIES, NOT CONTRACTUAL PENSION RIGHTS, AND THEREFORE, THE ENACTMENT OF GENERAL CODE SECTION 3307.651(2) AND (3) (THE 'NO INTEREST STATUTE'), WHICH IN 1959 STOPPED THE CREDITING AND PAYMENT OF INTEREST ON MANDATORY TEACHER CONTRIBUTIONS WITHDRAWN IN LIEU OF RETIREMENT, DID NOT IMPAIR, IN VIOLATION OF THE U.S. AND OHIO CONSTITUTIONS, A CONTRACTUAL OBLIGATION OF THE STRS TO PAY APPELLANT SOME 30 YEARS OF INTEREST EARNED ON THE CONTRIBUTIONS OF HIS WIFE, A FORMER TEACHER WHO DIED BEFORE RETIREMENT.

"2. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIM THAT THE NO INTEREST STATUTE, WHICH IS UNILATERALLY IMPOSED BY OHIO ON ALL PERSONS WHO WANT TO TEACH IN OHIO PUBLIC SCHOOLS AND WHICH PROHIBITS THE CREDITING AND PAYMENT OF INTEREST ON THEIR WITHDRAWN PENSION CONTRIBUTIONS, IS AN INVALID UNCONSCIONABLE ADHESION CONTRACT PROVISION.

"3. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIM THAT THE NO INTEREST STATUTE WHICH PROHIBITS THE CREDITING AND PAYMENT OF INTEREST WHICH IS THE PROPERTY OF THE APPELLANT CONSTITUTES A TAKING OF APPELLANT'S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE U.S. AND OHIO CONSTITUTIONS.

"4. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIM THAT THE FORFEITURE OF APPELLANT'S INTEREST UNDER THE NO INTEREST STATUTE AND THE APPLICATION OF THAT FORFEITED INTEREST TO FINANCE THE PENSIONS OF THOSE WHO RETIRE CONSTITUTES A DENIAL TO APPELLANT OF EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE U.S. AND OHIO CONSTITUTIONS.

"5. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS ON ITS AFFIRMATIVE DEFENSES OF WAVIER, EQUITABLE ESTOPPEL AND LACHES BECAUSE ALL THE MATERIAL FACTS NECESSARY TO PROVE THOSE DEFENSES WERE NOT ADMITTED IN THE COMPLAINT AND

BECAUSE APPELLANT AND HIS WIFE WERE NOT REQUIRED AS A MATTER OF LAW TO OBJECT TO OR BRING SUIT FOR THE CREDITING AND PAYMENT OF INTEREST ON HER CONTRIBUTIONS UNTIL THEY BECAME PAYABLE WHEN SHE DIED."

In his first assignment of error, appellant asserts there was a contract between Ohio public school teachers and STRS, and that the contract was substantially impaired in violation of Clause 1, Section 10, Article I, United States Constitution and Section 28, Article II, Ohio Constitution. Appellant argues that a contractual obligation existed to credit interest on contributions and that an obligation was eradicated by the no-interest statute.

Courts generally determine the existence of a contract as a matter of law. *Latina v. Woodpoth Development Co.* (1991), 57 Ohio St.3d 212. It is well-established that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.* (1985), 470 U.S. 451, 465-466, 105 S.Ct. 1441, 1451, quoting *Dodge v. Board of Education* (1937), 302 U.S. 74, 79, 58 S.Ct. 98, 100. A party may overcome this presumption by demonstrating that "the language and circumstances [of the statute] evince a legislative intent to create private rights of a contractual nature enforceable against the state." *Parker v. Wakelin* (D.Maine 1996), 937 F.Supp. 46, 52, quoting *United States Trust Co. v. New Jersey* (1977), 431 U.S. 1, 17, fn. 14, 97 S.Ct. 1505, 1515, fn. 14.

In *Mell v. State* (1935), 130 Ohio St. 306, the Supreme Court of Ohio took the position that Ohio's public pension systems provided public employees with gratuities from the

state. "A pension granted by public authorities is a gratuitous rather than a vested or contractual right." *Id.* at paragraph one of the syllabus. This holding was eroded by the passage of the vested right statutes. With respect to STRS, R.C. 3307.711, enacted in 1955, provides:

> "The granting of a retirement allowance, annuity, or pension to any person pursuant to action of the state teachers' retirement board vests a right in such person, so long as he remains the beneficiary of any of the funds established by section 3307.65 of the Revised Code, to receive such retirement allowance, annuity, or pension at the rate fixed at the time of granting such retirement allowance, annuity, or pension. Such right shall also be vested with equal effect in the beneficiary of a grant heretofore made from any of the funds named in section 3307.65 of the Revised Code."

In *State ex rel. Lemperle v. McIntosh* (1945), 145 Ohio St.107, the Supreme Court of Ohio explained the effect of the vested right statutes as follows:

> "It cannot be denied that there are now two classes of pensioners, those whose pensions are gratuitous and those whose pensions are vested. This classification or distinction was created *** by the enactment of the vested-interest statutes. Previous to its adoption certain pension rights were outstanding and subsisting, but subject to change by rule. ***" *Id.* at 111-112.

In *State ex rel. Cunat v. Trtustees of Cleveland Police Relief and Pension Fund* (1948), 149 Ohio St. 477 (supplemental opinion [1948], 150 Ohio St. 377), the court noted that the effect of the vested right statutes "is to make the engagement of public authorities to pay a pension, upon conditions fulfilled, a contractual obligation founded upon a valid consideration, giving to the pensioner a vested right in

his pension which cannot afterwards be impaired or revoked." *Id.*, first opinion at 482.

The gratuity theory of public pensions also has been undermined by decisions from other jurisdictions. The modern trend is to recognize that a public employee's rights under a public pension statute are contract rights. Courts that have found that public pensions create contractual obligations considered the public pension statutes in the context of traditional contract law principles. See *Parker, supra*, at 53; *McGrath v. Rhode Island Retirement Bd., Etc.* (C.A. 1, 1996), 88 F.3d 12, 17. The statutory promise of a pension in exchange for a requested performance, typically service for a period of time and monetary contributions, is construed to be an offer; the employees' performance is construed to be acceptance and consideration. *Parker* at 53; *McGrath* at 17. Thus, the courts conclude that the legislature evinced an intent to create private contractual rights. Reflecting the fact that the public pension statutes do not, contain express contract language and because the offer seeks performance, courts have described the resulting contract as an implied-in-fact, unilateral contract. *Parker* at 53; *McGrath* at 17.

Even under a contract theory, there is significant disagreement about when contractually enforceable rights accrue under such plans. Some state courts have determined that a contractual right to a reasonable pension accrues on the first day of employment, while other courts have taken the position that rights accrue when vesting occurs. *McGrath, supra*, at 17 (citing cases).

Although the Supreme Court of Ohio has not specifically embraced the principle that a public pension plan represents an implied-in-fact unilateral contract, we read *Cunat, supra*, as acknowledging that by statute a public employee's right to pension benefits accrues when vesting occurs and that by the clear language of R.C. 3307.711 a beneficiary's right to

receive funds vests when the benefit is conferred. See *Herrick v. Lindley* (1979), 59 Ohio St.2d 22, 27 ("PERS or STRS retirees have a vested right to receive a retirement allowance or similar benefit at the rate fixed by law when such benefit was conferred"). Therefore, in deciding whether appellant has a contractual right to interest on his wife's contributions, we must determine when, if ever, her right to receive a refund of her contributions plus interest vested.

The statutes that provided for a return of contributions plus interest contained requirements that receipt of such funds was contingent upon the death of the member, or application for withdrawal of contributions after cessation of service. G.C. 7896-41, 7896-40; R.C. 3307.46, 3307.48. See, also, 1960 Ohio Atty.Gen.Ops. No. 1467, at 418 (the right to receive payment of survivor benefits granted in R.C. 3307.49 accrues on the date of the death of the member or at the time of the happening of any statutory condition precedent [attaining of the age requirement by the survivor] whichever is later; and the benefits to be received by a survivor thereunder are fixed by the law in effect at the time the right to survivor benefits accrues). Prior to the occurrence of the contingent event, appellant's spouse did not have a right to receive a refund of her contributions plus interest. At one time, Horvath or his spouse may have expected that the law would remain unamended, but there is no vested right to the mere continuance of a law. *Kroger v. Greyhound Lines, Inc.* (1993), 90 Ohio App. 387, 391; *Moore v. Bureau of Unemployment Comp.* (1943), 73 Ohio App. 362; *Haskins v. Bias* (1981), 2 Ohio App.3d 297.

Pursuant to *Cunat, supra*, STRB did not have any contractual obligation to pay appellant until his rights vested. At the time appellant's spouse died, appellant's right to receive payment accrued, and he had a vested right to payment that could not "afterwards be impaired or revoked." The

enactment of R.C. 3307.651(2) and (3) in 1959 and 1964 did not impair a contractual obligation of STRS because appellant's right to receive payment did not accrue until his spouse died, which was after the enactment of the statute. Appellant's first assignment of error is not well-taken.

In his second assignment of error, appellant claims that the no-interest statute is an unconscionable contract provision. Because appellant and his wife had no vested contractual rights at the time the no-interest statute was enacted, the second assignment of error is also not well-taken.

In his third assignment of error, appellant claims that application of the no-interest statute results in an unconstitutional taking of a teacher's property without just compensation. Appellant relies upon *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980), 449 U.S. 155, 101 S.Ct. 446, for the proposition that appropriation of interest earned on private monies temporarily held by the government is an unconstitutional taking. In that case a purchaser of the assets of an insolvent business deposited the purchase price into the court. The clerk of the court was required to invest the money in an interest bearing account pending distribution to creditors. The court deducted one percent of the first $500 and one-half percent of the remainder of the sum deposited as a fee for services rendered for receiving money into the registry of the court, and also kept the interest accrued on the deposited fund. The United States Supreme Court held that, where there is a separate and distinct state statute authorizing a fee for services rendered based upon the amount of principal deposited, where the deposited fund is concededly private, and where the deposit in the court's registry is required in order for the depositor to avail itself of statutory protection from claims of creditors, then the county's appropriation of the interest earned by the interpleaded fund while it was deposited with the court was an unconstitutional taking. *Id.*

The circumstances of the present case are readily distinguishable from those in *Webb's*. Unlike money deposited by an interpleader stakeholder, STRS funds are deposited and invested solely for the benefit of participants and their beneficiaries. The members of the STRB have a fiduciary duty to act as trustees of the funds deposited. R.C. 3307.15(B). Pursuant to statute, the right of a designated beneficiary to receive a member's accumulated contributions accrues at the death of the member.

In *Kodish v. Board* (1975), 45 Ohio App.2d 147, this court was presented with the issue of whether members of the Public Employees Retirement System ("PERS") who left public service prior to retirement or death were entitled to interest on their returned contributions. This court held that "[s]tate employees have no vested property right in their contributions to a compulsory retirement system unless and until such rights are granted by specific legislation or rule." *Id.* at 153. This court further stated that specific legislation did vest rights in the employee's own contributions which are returned without interest. Once a member becomes eligible and is granted a benefit, that right to receive payment cannot be reduced or denied by subsequent legislation. See, e.g., *State ex rel. McLean v. Retirement Board* (1954), 161 Ohio St. 327, paragraph one of the syllabus. ("The right of a member of the Public Employees Retirement System to disability retirement allowance is governed by the statutes in force when such member becomes eligible for and is granted such retirement, and that right can not be reduced or denied by subsequent legislation.")

Under R.C. 3307.711, the vesting statute, appellant does not have a property right in his wife's contributions until his rights vest. In this case, no right to receive interest was ever vested in appellant or his wife until her death and, under the law in effect when appellant's wife died, he was entitled to

interest only on his wife's pre-1959 contributions. R.C. 3307.651.

In *Kodish, supra*, the court noted that all members of the system are recipients of further benefits during the course of their employment, such as substantial benefits to their survivors in the event that they die during the period of their service, insurance benefits, and disability retirement provisions. "Consequently, the member who does not serve till his death or retirement does receive benefits other than the return of his actual contribution by virtue of having been a member of the PERS." *Id.* at 154.

While a member of STRS, Mrs. Horvath enjoyed similar benefits in the nature of insurance in the event of death or disability. Although she did not die or become disabled during the course of her employment and, accordingly, never collected those benefits, appellant may not now reject the portions of the system which displease him at this late date. The third assignment of error is not well-taken.

In his fourth assignment of error, appellant argues that the no-interest statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 2, Article I, Ohio Constitution. Appellant claims that the effect of the no-interest statute is to create two classes of participants in the plan: those who do not retire and do not receive the interest on their withdrawn contributions, and those who do retire and do receive, by means of their pensions, the benefit of the interest on their contributions.

The Equal Protection Clauses of the United States and Ohio Constitutions seek to ensure that similarly situated people are treated alike. Equal protection does not require things which are different in fact or opinion to be treated in law as though they were the same. *Phyler v. Doe* (1982), 457 U.S. 202, 216, 102 S.Ct. 2382, 2394. Because no suspect

class or fundamental right is involved, the statutory classification will not violate the Equal Protection Clauses if it bears a rational relationship to a legitimate governmental interest, and the statute must be upheld unless the classification is irrelevant to achievement of the state's purpose. *Roseman v. Firemen & Policemen's Death Benefit Fund* (1993), 66 Ohio St.3d 443, 447.

Appellant's equal protection claim fails for the fundamental reason that appellant's classification is not between those who are similarly situated. Retirees and nonretirees are not similarly situated. The overall purpose of STRS is to provide for the payment of retirement allowances and other benefits as set forth in R.C. Chapter 3307. R.C. 3307.03. Legitimate reasons exist to distinguish between plan participants who fulfill the eligibility requirements for retirement and those who do not. Just as the vesting statutes create a class of persons whose pensions are vested and a class of participants who have yet to fulfill the requirements for a vested pension, the no-interest statute treats all teacher-members equally. The difference between those who receive interest and those who do not stems from a teacher's own employment decisions, health, longevity, and the law in effect at the time the teacher vests in a particular benefit or right. The fourth assignment of error is not well-taken.

Given our disposition of the first four assignments of error, we need not reach the issue of affirmative defenses, and appellant's fifth assignment of error is rendered moot by our disposition of the other four assignments of error.

For the foregoing reasons, appellant's first, second, third, and fourth assignments of error are overruled, and the fifth assignment of error is rendered moot, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN and PETREE, JJ., concur.

Judgment of the Court of Common Pleas

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CIVIL DIVISION

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FRANKLIN CO. OHIO
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JESSE D. ODDI
CLERK OF COURTS

State, ex re., :
Theodore J. Horvath
Relator, : Case No. 92CCVH-10-8007

v. : JUDGE CAIN

State Teachers Retire-
Board., :
Respondent. :

JOURNAL ENTRY GRANTING STATE TEACHERS RETIREMENT BOARD'S MOTION TO DISMISS

On June 5, 1996, this matter came before the Court for consideration of the Defendant State Teachers Retirement System's Motion to Dismiss and for Judgment on the Pleadings.

Therefore, for good cause shown and based upon the reasons set out in the decision of this Court, rendered on June 5, 1996, and filed on June 6, 1996, IT IS THEREFORE ORDERED, that this Court hereby GRANTS Defendant's Motion to Dismiss and for Judgment on the Pleadings on all claims presented. Costs for this action are assessed against Relator.

This is a final appealable order on all claims, and there is no just cause for delay.

DATED:_____, 1996 _____
HON. D. CAIN, JUDGE

APPROVED:

disapproved per 6-26-96
/s/_____ phone call_____

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Opinion of the Court of Common Pleas

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

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FRANKLIN CO., OHIO
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JESSE D. ODDI
CLERK OF COURTS

State, ex rel. :
Theodore J. Horvath, :
Relator, :

Case No.
vs. : 92CVH-10-8007

The State Teachers : JUDGE CAIN
Retirement Bd., :
Respondent. :

DECISION GRANTING DEFENDANT STATE TEACHERS RETIREMENT BOARD'S MOTION TO DISMISS

Rendered this 5th day of June 1996.

CAIN, J.

This matter is before the Court on motion of Defendant-Respondent State Teachers Retirement Board ("STRB") to dismiss the complaint of Plaintiff-Relator State of Ohio, ex rel. Theodore J. Horvath. Relator filed a memorandum contra. The Court after serious review and consideration finds Defendant's motion to dismiss well-taken and GRANTS it.

Factual Background

Relator is the surviving spouse of Sydney P. Horvath ("Sydney"). Sydney was employed by the Bedford Board of Education ("Bedford") from September 1951 to March 1964 as an art teacher. Bedford is located in Cuyahoga County, Ohio.

Pursuant to Sydney's employment contract, she became a contributing member of the State Teachers Retirement System ("STRS"). Sydney was required to contribute into the STRS Plan ("Plan") an amount equal to 8% of her salary by means of payroll deductions, pursuant to R.C. S 3307.51. As a result, Sydney contributed $4,540.41 to STRS in 12.85 years of teaching. The contributions were accumulated in the Teacher's Savings Fund of the STRS. R.C. 3307.65(A).

Additionally, each school is required to contribute into the STRS Plan an amount equal to 14% of the teacher's salary. Pursuant to R.C. 3307.15, STRB is required to administer the STRS Plan in the best interest of the State's teachers.

Prior to 1959, STRS was required to annually credit compound interest on the teacher's accumulated contributions to each teacher's individual account. However, in 1959, Ohio enacted R.C. 3307.651 to provide that after August 31, 1959, interest would not be credited annually to each teacher's account. Instead, R.C. 3307.651 provides that STRS shall credit a teacher's account with interest only after the teacher retires. In other words, since 1959, Sydney's account was not credited with compound interest on her $4,540.51 contribution. Rather, the compound interest would have only been computed and credited upon her retirement. Because Sydney unfortunately did not reach retirement age, she is not entitled to have compound interest credited to her account.

R.C. 3307.28 [*sic* and .38] provides that a former teacher with at least five (5) years of service is eligible to receive

monthly retirement benefits after reaching age 60 if the teacher leaves his or her contributions in the STRS Plan. In this case, Sydney chose not to withdraw her contributions in order to receive retirement benefits.. Unfortunately, she died in 1991 [*sic*] at the age of 59. Because Sydney did not reach the age of 60, her contributions did not vest and her beneficiary is only entitled to her original accumulated contribution of $4,540.51.

By application dated December 28, 1990, Relator applied to withdraw all of Sydney's contributions from her individual account in the Teacher's Saving Fund, namely $4,540.51. In addition, Relator requested compound interest thereon in the amount which should have been credited to her account on the date of STRS' payment of her contributions if Sydney had retired on that date and had been entitled to a credit of such interest pursuant to R.C.3307.651(l). Complaint 44. STRS offered to pay Relator Sydney's accumulated contributions without any interest and mailed a check to Relator in the amount of $4,540.51. Relator has not accepted the check and is holding it subject to disposition as ordered by the Court. Complaint 45.

Relator argues that he is entitled to interest compounded annually for the years that Sydney's contributions remained in the Plan. Relator requests this Court to declare R.C. 3307.651(2), (3), and (4) void as a violation of the United States and Ohio constitutions, as an unconscionable contract, and as a scheme of chance for profit in violation of R. C. 2915.02(A)(2). In response, Defendant asserts various affirmative defenses, three of which were more fully argued in Defendant's motion to dismiss. They are: (1) equitable estoppel; (2) doctrine of laches; and (3) waiver.

Legal Standard

According to Ohio Civ. R. 12(B)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. In general, a motion to dismiss a complaint is not viewed favorably and should be granted sparingly. 75 Ohio Jur. 3d, Pleading 340. Dismissal is appropriate where " * * * it appears beyond a reasonable doubt that [relator] can prove no set of facts entitling him to relief * * *. Zuber v. Dept. of Ins. (1986 Franklin Co.) 34 Ohio App. 3d 42, 46, 516 N.E.2d 244 (motion dismissed).

Legal Analysis

I. Contract Clause

The U.S. Supreme Court has created a three-part test to determine whether a state has impaired a contract in violation of Article I, Section 10, Clause 1 of the U.S. Constitution and Article II, Section 28 of the Ohio Constitution. First, it must be determined whether the state law has substantially impaired a contractual relationship between the state and another party. Energy Reserves Group Inc. v. Kansas Power & Light (1983), 459 U.S. 400, 410. Second, the state must have a significant and legitimate public purpose for the legislation. Id. at 412. Third, it must be determined whether the adjustment of the rights of the contracting parties is reasonable and appropriate for its purpose. Id.

The crucial issue in this case is whether the provisions of the STRS Plan create a contractual relationship between the State and its teachers that was impaired by the enactment of R.C. 5 3307.651. Relator has the burden to prove such a contractual relationship exists. "He who asserts the creation of a contract with the state has the burden of overcoming the presumption [that a law is not intended to create private contractual rights]." Dodge v. Board of Education (1937), 302 U.S. 74, 79.

Relator argues that the General Assembly intended the STRS Plan to create private rights of a contractual nature enforceable against the State. The U.S. Supreme Court stated that a statute itself is a contract " . . . when the language and circumstance evince a legislative intent to create private rights of a contractual nature enforceable against the State." Id. at 17, note 14. Further, Relator asserts that the STRS Plan is not a gratuity. Rather, Relator asserts, it is consideration for services which were not fully recompensed when rendered." State, ex rel. Cunat V. Trustees of the Cleveland Police Relief and Pension Fund (1948), 149 Ohio St. 477, 481-482. Relator also argues R.C. 3307.711, which states that the rights of a recipient of a retirement, disability, or survivor benefit are vested from the time the benefit is granted regardless of whether the benefit was granted before or after the effective date of the statute.

However, the Defendant argues that the STRS Plan does not create a contractual relationship between the State and its teachers. The Franklin County Court of Appeals has stated that "[t]he obligations of a contract are impaired where a law substantially invalidates, releases, or extinguishes the obligations of a contract or diminishes substantial contractual rights in favor of one party against another." Lawrence v. Edwin Shaw Hospital (1986), 34 Ohio App. 3d 137, 139. The Franklin County Court of Appeals continued by stating that the benefit rights; conferred by statute are not contractual in nature and may be modified according to the will of the legislature. Id. at 139. Mell v. State (1935), 130 Ohio St. 306, 309. The Contract Clause does not prohibit a State from repealing or amending existing statutes. United States Trust Co. v. New Jersey (1977), 431 U.S. 1, 17.

Further, the Franklin County Court of Appeals stated that retirement benefits provided by PERS were a gratuity. Kodish v. Public: Employees Retirement Board (Franklin Co. Ct.

App., 1975), 45 Ohio App. 2d 147. Additionally, the Franklin County Court of Appeals stated that, "There is a vested right in the employee's own contributions, but no right to interest for use of the money while such is within the hands of PERS." Id. at 152. The statutes in the PERS plan were substantially similar to those in the STRS Plan.

In this case, with respect to whether a contractual relationship exists, this Court finds that the provisions of STRS do not create a contract. Rather, the provisions create "a scheme of public regulation that allows for the payment of gratuities to Ohio's teachers." Motion to Dismiss, p. 7. Just as Social Security does not create a contract with employees, STRS does not create a contract with teachers. As a result of the lack of a contractual relationship, the first prong of the Energy Reserves test fails, and there can be no Contract Clause violation.

II. Unconscionability

Relator argues as his second claim that the "retirement benefit contracts" of STRS in R.C. 3307.651 (2), (3), and (4) are unconscionable contract provisions. However, this Court has already held that no contract exists in this case. As a result, Relator's allegation must fail and is not well-taken.

III. Lottery

Relator argues as his third claim that STRS constitutes a lottery in violation of Article XV, Section 6 of the Ohio Constitution, and as a scheme of chance for profit in violation of R.C. 2915.02(A)(2). R.C. 2915.02(A)(2) makes it unlawful to:

> Establish, promote, or operate or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit.

In this case, STRS does not profit from the teacher contributions. Instead, STRS is a qualified trust and exists in order to provide benefits to its participants. As a result, this Court finds that STRS is neither a lottery nor a scheme of chance for profit.

IV. Taking

Relator's fourth claim is that R.C. 3307.651 (2), (3), and (4) constitute an illegal taking without just compensation in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section 19 of the Ohio Constitution. Relator alleges that the requirement in Chapter 3307 that every teacher must contribute his own money into STRS is a taking because the teacher is "completely divested of possession, control, use, and the ability to dispose of his contributed money." Mem. in Opp., p. 50.

The Ohio Supreme Court has defined an illegal taking as "any substantial interference with the elemental rights growing out of ownership of private property." Smith v. Erie Railroad Co. (1938), 134 Ohio St. 135, 142. Additionally, the U.S. Supreme Court has stated:

> [a] taking may more readily be found when the interference with property can be characterized as a physical invasion by the government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transportation co. v. New York (1978), 438 U.S. 104. The Court also noted that "government may execute laws or programs that adversely affect recognized economic values . . ." Id.

In this case, the right of the legislature to establish provisions for the effective administration of STRS is

necessary for its continued existence. The provisions of R.C. 3307.651 "merely liberalize what constitutionally may be done without resulting in an infringement of constitutional rights." Kodish, 45 Ohio App. 2d at 153. As a result, R.C. 3307.651 does not constitute an illegal taking in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section 19 of the Ohio Constitution.

V. Equal Protection

As Relator's fifth claim, he asserts that R.C. 3307.651 (2), (3), and (4) violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 2 of the Ohio Constitution. The Ohio Supreme Court has stated that the central characteristic of a valid equal protection claim is differential treatment between two groups of people. Kinney v. Kaiser Corp. (1975), 41 Ohio St. 2d 120. Further, the U.S. Supreme Court has set forth the general rule that the legislation will be sustained if the classification drawn by the statute "is rationally related to a legitimate state interest." Cleburne V. Cleburne Living Center, Inc. (1984), 473 U.S. 432.

Relator argues that "the no-interest statute denies equal protection of the laws to those who withdraw teacher contributions from the STRS Plan as opposed to those who receive retirement benefits in violation of Amendment XIV of the U.S. Constitution and Article I, Section 2 of the Ohio Constitution." Mem. in Opp., p. 57. In this case, when R.C. 3307.651 was enacted, there was no unequal treatment between the retiring and nonretiring teachers. The STRS Plan applied equally to all teachers. The difference between the teachers who received interest and those who did not was a direct result of the teacher's own actions, not from any discriminatory effect in R.C. 3307.651. Therefore, the statute is not facially discriminatory.

As the Plan more fully took effect, however, the result was that the non-retiring teachers forfeited their interest for the benefit of the retiring teachers and for the benefit of the continued existence of STRS. Because of this differential treatment, it is necessary to examine whether R.C. 3307.651 is rationally related to a legitimate state interest. The U. S. Supreme court has stated:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

City of New Orleans v. Dukes (1976), 427 U.S. 297, 304-5.

In this case, the purpose of R.C. 3307.651 is to provide for the payment of interest in a way that benefits both the teachers and STRS. The successful operation of STRS is a legitimate state interest. As a result, R.C. 3307.651 is not a violation of equal protection.

VI. ERISA

Relator's sixth claim is that Section 4(b)(1) of ERISA is void as a violation of the Commerce Clause in violation of Article I, Section 8 of the U.S. Constitution. However, Section 4(b)(1) illustrates that Congress has chosen to leave governmental pension plan regulation open to the states. Because this is within Congress' power to do so, the enactment of ERISA did not violate the Commerce Clause.

VII. ERISA/Equal Protection

Relator's seventh claim is the following:

The application of the no-interest statute after the enactment of ERISA denies to Ohio teachers protection equal to the protection provided by ERISA to Ohio residents who

are not public employees in violation of Amendment XIV of the U.S. Constitution and Article I, Section 2 of the Ohio Constitution. Mem. in Opp., p. 63.

As previously stated in this decision, ERISA is not applicable, and R.C. 3307.651 does not violate the Equal Protection clauses of the U.S. and Ohio Constitution's.

AFFIRMATIVE DEFENSES

VIII. Equitable Estoppel

Defendant claims that the doctrine of equitable estoppel bars Relator from challenging R.C. 3307.651. As stated in First Federal Savings & Loan Association of Toledo v. Perry's Landing (1983), 11 Ohio App. 3d 135, 145, the Court of Appeals stated that there are four elements necessary for a claim of equitable estoppel:

1. A representation of fact by words, acts or silence by a person who knows the facts underlying the representation;

2. The representation must communicate some fact or state of affairs in a misleading way;

3. The representation must induce actual reliance by the second party, and such reliance must be reasonable under the circumstances and made in good faith; and

4. The relying party would suffer prejudice or pecuniary disadvantage if the party whose representation was relied upon were not estopped or precluded from asserting an otherwise valid right in contradiction to his earlier representation.

In this case, pursuant to R.C. 3307.58, STRS fully informed Sydney of the provisions in R.C. 3307.651 thereby precluding the defense of lack of knowledge. At that time, Sydney did not dispute the 1959 amendment. Because Relator and Sydney waited more than 30 years to bring this suit, their

actions constitute a factual representation to STRS that Relator and Sydney accepted the provisions of R.C. 3307.651. This delay estops Relator from now bringing this action.

IX. Doctrine of Laches

Defendant claims that the doctrine of laches prevents Relator from bringing this suit because 30 years constitutes an unreasonable delay. The Ohio Supreme Court has defined laches by stating, "laches is defined as '[u]nreasonable delay; neglect to do a thing or seek to enforce a right at the proper time.'" Dent v. AT&T Technologies, Inc. (1988), 38 Ohio St. 3d 187, 189-190. Further, the Cuyahoga County Court of Appeals stated that the elements of laches are:

(1) Delay in asserting a right;
(2) Absence of an excuse;
(3) Knowledge of injury; and
(4) Prejudice to the other party.

Kennedy v. Cleveland (1984), 16 Ohio App. 3d 399.

In this case, Relator and his wife did not bring suit for over 30 years, which is an unreasonable delay. Further, there is no excuse for this delay because Relator's wife knew of the 1959 amendment at the time of its enactment. Relator and his wife should have brought suit in 1959. The failure to do so renders the doctrine of laches appropriate in this matter.

X. Waiver

Defendant asserts that Relator's wife waived her right to challenge the provisions of the STRS Plan and therefore ought to be prevented from bringing this suit. A waiver is a voluntary relinquishment of a known right. 42 Ohio Jur.3d Waiver Section 93. It is a matter of intention with knowledge of the right involved, and it may be by express words or by necessary implication. Id.

In this case, Relator did not dispute the 1959 enactment of R.C. S 3370.651. Therefore, it can be implied that she consented to its provisions. This consent operates as a waiver which now prevents Relator from bringing this suit.

Conclusion

Based on this Decision, this Court hereby GRANTS Defendants STRB's Motion to Dismiss. R.C. 9 3307.651 is a valid statute and, according to its provisions, Relator is not entitled to the annual interest on his wife's STRS account.

Counsel for Defendant shall prepare, submit, and circulate an appropriate journal entry in accordance with Loc. R. 25.01.

/s/

David E. Cain, judge

ORDER ON RECONSIDERATION

Order of the Supreme Court of Ohio Denying Reconsideration

The Supreme Court of Ohio

FILED
OCT 07 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

1998 TERM

State ex rel. Theodore J. Horvath, Appellant, : Case No. 97-1197

v. : RECONSIDERATION ENTRY

The State Teachers Retirement Board, Appellee. : (Franklin County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 96APE08983)

/s/
THOMAS J. MOYER
Chief Justice

Excerpt from Petitioner's Brief in Support of Reconsideration by the Ohio Supreme Court

FILED
AUG 31 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

. . . . . .

BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION

. . . . . .

On page 6 of its opinion, the Court states that appellant claims his wife had a "property right to earned interest as an incident of ownership of the account set up in her name" and that such right is a "constitutional property right." This is not a correct statement of appellant's claim. The taking prohibitions of the U.S. and Ohio Constitutions do not create property rights.

On pages 19 and 20 of its Merit Brief, appellant clearly states that the temporary, exclusive possession, use and control of Mrs. Horvath's contributions by the STRS was a temporary taking of her contributions and that the permanent retention by the STRS of the earnings attributable to her contributions was a permanent taking of her earnings on those contributions. Then appellant claims that R.C. 3307.651(2) is invalid not because it takes interest owned by her, but because since 1959 it has terminated interest compensation for the takings of Mrs. Horvath's contributions and earnings.

Appellant repeated this claim on page 6 of his Reply Brief and pointed out that it is based on the universal common law principle that the earnings on property belong to the owner of the property as held in *Beckford v. Tobin* (1749), 1 Ves. Sen. 308, 27 Eng. Rep. 1049. That principle of law was recognized

by This Court as the law of Ohio in *Eshelby v. The Cincinnati Board of Education* (1902), 66 Ohio St. 71.

. . . . . .

CONSTITUTION

United States Constitution

Amendment V, Takings Clause:

. . . nor shall private property be taken for public use, without just compensation.

STATUTES

Ohio Revised Code

The following sections, except R.C. 3307.80, are those in effect prior to March 31, 1997.

Section 3307.01(I):

"As used in Chapter 3307. of the Revised Code:

(I) "Accumulated contributions" means the sum of all amounts credited to a contributor's individual account in the teachers' savings fund, together with interest credited thereon at the rates approved by the state teachers retirement board prior to retirement.

Section 3307.03:

A state teachers retirement system is hereby established for the teachers of the public schools of the state which includes the several funds created and placed under the management of the state teachers retirement board for the payment of retirement allowances and other benefits under chapter 3307 of the Revised code. The board may sue and be sued, plead and be

impleaded, contract and be contracted with, and do all things necessary to carry out such sections. All of its business shall be transacted, and all of its funds shall be invested, all warrants for money drawn and payments made, and all of its cash, securities, and other property shall be held in the name of the board or in the name of its nominee, provided that nominees are authorized by retirement board resolution for the purpose of facilitating the ownership and transfer of investments and are restricted to members of the board, the executive director, and designated members of the staff, or a partnership or corporation composed of any of the foregoing persons.

Section 3307.15(A), first paragraph:

(A) The members of the state teachers retirement board shall be the trustees of the funds created by section 3307.65 of the Revised Code. The board shall have full power to invest the funds. The board and other fiduciaries shall discharge their duties with respect to the funds solely In the interest of the participants and beneficiaries; for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system, with care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims; and by diversifying the investments of the system so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

Section 3307.19, first sentence:

The state teachers retirement board shall provide for the maintenance of an individual account with each contributor showing the amount of his contributions and the interest accumulations thereon.

Section 3307.28, first paragraph:

The membership of any person in the state teachers retirement system shall cease if he withdraws his accumulated contributions; or if he retires as provided in section 3307.38 of the Revised code; or if he dies; or if the state teachers retirement board denies him membership pursuant to section 3307.27 of the Revised code.

Section 3307.38:

Any member who has five years of service credit and has attained age sixty, or who has twenty-five years of service credit and has attained age fifty-five, or who has thirty years of service credit shall be granted service retirement after filing with the state teachers retirement board a completed application on a form approved by the board.

(A) Service retirement shall be effective on the first day of the month next following the later of:

(1) The last day for which compensation was paid; or

(2) The attainment of minimum age or service credit eligibility for benefits provided under this section.

Except as otherwise provided in division (D) of this section, the service retirement benefit shall be the greater of the benefits provided in divisions (B) and (C) of this section.

(B)(1) Subject to any adjustment made under division (B)(2) of this section, the annual single lifetime benefit of a member shall be the greater of the amounts determined by his Ohio service credit multiplied by one of the following:

(a) Eighty-six dollars;

(b) Two and one-tenth per cent of his final average salary, except that if the member has more than thirty years service credit carried under section 3307.31 or purchased under section 3307.512 of the Revised Code, two and

five-tenths per cent of his final average salary for each year or fraction of a year of service credit earned or purchased under those sections that is in excess of thirty years.

(2) The annual single lifetime benefit of a member determined under division (B)(1) of this section shall be adjusted by the greater per cent shown in tile following schedule opposite his attained age or Ohio service credit.

Attained or Age	Years of Ohio Service Credit	Per Cent of Base Amount
58	25	75%
59	26	80
60	27	85
61		88
	28	90
62		91
63		94
	29	95
64		97
65	30 or more	100

Members shall vest the right to a benefit in accordance with the following schedule, based on the member's attained age by September 1, 1976:

Attained Age	Per Cent of Base Amount
66	102%
67	104
68	106
69	108
70 or more	110

(3) The annual single lifetime benefit determined under this division shall not exceed the lesser of one hundred per cent of the final average salary or the limit established by section 415 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 415, as amended.

(C) The annual single lifetime benefit of a member shall not exceed the lesser of the sum of the following amounts or the limit established by section 415 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 415, as amended:

(1) An annuity with a reserve equal to the member's accumulated contributions;

(2) A pension equal to the amount in division (C)(1) of this section;

(3) An additional pension of forty dollars annually multiplied by the number of years of prior and military service credit, except years of credit purchased under section 3307.021 of the Revised Code;

(4) An additional basic annual pension of one hundred eighty dollars, provided the member had ten or more years of Ohio service credit as of October 1, 1956, except that the additional basic annual pension shall not exceed the sum of the annual benefits provided by divisions (C)(1), (2), and (3) of this section.

(D) Benefits determined under this section shall be paid as provided in section 3307.50 of the Revised Code.

Section 3307.405, first paragraph:

The board of the state teachers retirement system shall make available to each member or former member receiving a monthly allowance or benefit on or after January 1, 1968, who has attained the age of sixty-five years, and who is not eligible to receive hospital insurance benefits under the federal old age, survivors and disability insurance program, hospital

insurance coverage substantially equivalent to the federal hospital insurance benefits, Social Security Amendments of 1965, 79 Stat. 291, 42 U.S.C. 1395c, as amended. This coverage shall also be made available to the wife, husband, widow or widower of such member or former member, provided such wife, husband, widow or widower has attained age sixty-five and is not eligible to receive hospital insurance benefits under federal old age, survivors and disability program. The widow or widower shall be eligible for such coverage only if he or she is the recipient of a monthly allowance or benefit from this system. One-half of the cost of the premium for such coverage shall be paid from the appropriate funds of the state teachers retirement system and on-half by the recipient of the allowance or benefit.

Section 3307.42(A), first paragraph:

(A) The state teachers retirement system shall provide disability coverage to each member who has at least five years of total service credit.

Section 43, first two paragraphs:

A member who has elected disability coverage under this section has, not attained age sixty, and is determined by the state teachers retirement board under section 3307.42 of the Revised Code to qualify for a disability benefit shall be retired on disability under this section.

Upon disability retirement, a member shall receive an annual amount that shall consist of:

(A) An annuity having a reserve equal to the amount of the member's accumulated contributions at the time;

(B) A pension that shall be the difference between the annuity and all annual amount determined by multiplying the number of years of Ohio service credit of such member, and in addition the number of years and fraction of a year between

the effective date of his disability retirement and the date he attained age sixty, assuming continuous service, by eighty-six dollars, or by two per cent of his final average salary, whichever is greater. Such disability retirement shall not be less than thirty per cent nor more than seventy-five per cent of his final average salary, except that it shall not exceed any limit to which the retirement system is subject under section 415 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 415, as amended.

Section 3307.46, part of first sentence:

. . . [A] contributor who ceases to be a teacher for any cause other than death or retirement, upon application, shall be paid the accumulated contributions standing to the credit of his individual account in the teachers' savings fund.

Section 3307.48(B), first sentence:

Should a contributor die before service retirement, his accumulated contributions shall be paid to such beneficiaries as he has nominated by written designation signed by him and filed with the state teachers retirement board prior to his death.

Section 3307.49(C), part:

(C) In lieu of accepting the payment of the accumulated account of a member who dies before service retirement, a beneficiary, as determined in section 3307.48 of the Revised Code, may elect to forfeit the accumulated account and to substitute benefits under this division.

(1) If a deceased member was eligible for a service retirement allowance as provided in section 3307.38 or 3307.39 of the Revised Code, a surviving spouse, a qualified dependent designated as the member's sole beneficiary pursuant to division (B) of section 3307.49 of the Revised Code, or an individual designated as the member's sole beneficiary pursuant to division (B) of section 3307.48 of the

Revised Code who received one-half or more of support from the member during the twelve-month period preceding the member's death may elect to receive a monthly benefit computed as the joint-survivor allowance designated as option 1 in section 3307.50 of the Revised Code, which the member would have received had the member retired on the last day of the month of death and had the member at that time selected such joint-survivor plan. Payment shall begin with the month subsequent to the member's death.

(2) If a deceased member had completed at least one and one-half years of credit for Ohio service, with at least one-quarter year of Ohio contributing service credit within the two and one-half years prior to the date of death, or was receiving at the time of death a disability benefit as provided in section 3307.43 or 3307.431 of the Revised Code, a surviving spouse or other qualified dependent beneficiary may elect to receive monthly benefits as provided in division (C)(2) of this section. [Omitted benefit provisions based on percent of final average salary, years of service and number of qualified dependents.]

Section 3307.51, first two sentences:

Each teacher shall contribute eight per cent of his earned compensation to the teachers' savings fund, except that the state teachers retirement board may raise the contribution rate to the fund to a rate not greater than ten per cent of the teacher's carried compensation. Such contribution shall be deducted by the employer on each payroll in an amount equal to the applicable per cent of such contributors' paid compensation for such payroll period or other period as the state teachers retirement board may approve, provided all contributions on earned compensation are remitted to the state teachers retirement system by the thirtieth day of June of each year.

Section 3307.53:

Each employer shall pay annually to the employers' trust fund an amount certified by the secretary which shall be a certain per cent of the earnable compensation of all members, and which shall be known as the "employer contribution." The rate per cent of such contribution shall be fixed by the actuary on the basis of his evaluation of the liabilities of the state teachers retirement system, not to exceed fourteen per cent, and shall be approved by the state teachers retirement board. The state teachers retirement board may raise the rate per cent of the contribution to fourteen per cent of the earnable compensation of all members. In making such evaluation, the actuary shall use, as the actuarial assumptions, such interest rates and mortality and other tables as are adopted by the state teachers retirement board. He shall compute the percentage of such earnable compensation, to be known as the "employer rate," required annually to fund the liability for all benefits provided by this chapter, after deducting therefrom the annuity and other benefits provided by the member's accumulated contributions, deposits, and other appropriations, and to fund any deficiencies in the various funds described in section 3307.65 of the Revised Code.

Section 3307.58:

Each employer, before employing any teacher to whom sections 3307.01 to 3307.72, inclusive, of the Revised Code, applies, shall notify such person of his duties and obligations under such sections as a condition of his employment,

Any such appointment or reappointment of any teacher in the public day schools of the state, or service upon indefinite tenure shall be conditioned upon the teacher's acceptance of such sections, as a part of the contract.

Section 3307.65:

The state teachers retirement Board shall be the trustee of certain funds hereby created as follows:

(A) The "teachers' savings fund" is the fund in which shall be accumulated the contributions deducted from the compensation of teachers and faculty members as provided by section 3307.51 of the Revised Code, together with the interest credited thereon. Such accumulated contributions refunded upon withdrawal, or payable to an estate or beneficiary as provided in this chapter, shall be paid from this fund. Any accumulated contributions forfeited by the failure of a contributor, an estate, or a beneficiary to claim the same shall be transferred from this fund to the guarantee fund. The accumulated contributions of a member or of a teacher who qualifies for a benefit wider section 3307.381 of the Revised Code shall be transferred at his retirement from the teachers' savings fund to the annuity and pension reserve fund. The accumulated contributions of a member who dies prior to superannuation retirement that are forfeited by the qualified beneficiary in exchange for monthly survivor benefits, as provided by section 3307.49 of the Revised Code, shall be transferred to the survivors' benefit fund. The accumulated contributions of a superannuate or other system retirant as defined in section 3307.381 of the Revised Code shall be transferred to the survivors' benefit fund for payment of a lump sum benefit to a beneficiary as provided in section 3307.381 of the Revised Code.

(B) The "employers' trust fund" is the fund to which the employer contribution shall be credited and in which shall be accumulated the reserves held in trust for the payment of all pensions or other benefits provided by sections 3307.38, 3307.381, 3307.39, 3307.43, 3307.431, 3307,49, 3307,50, 3307.70, and 3307.78 of the Revised Code, to teachers retiring or receiving disability benefits in the future or to their

qualified beneficiaries, and from which the reserves for such pensions and other benefits shall be transferred to the annuity and pension reserve fund and to the survivors' benefit fund. The balances as of August 31, 1957, in the employers accumulation fund shall be transferred to this rund. As of September 1, 1957, an additional amount shall be transferred from the employers' trust fund to the annuity and pension reserve fund in the amount required to complete the funding of the prior service and military service pensions then payable.

(C) The "annuity and pension reserve fund" is the fund from which shall be paid all annuities, pensions, and disability benefits for which reserves have been transferred from the teachers' savings fund and the employers' trust fund.

(D) The "survivors' benefit fund" is the fund from which shall be paid the survivors' benefits provided by section 3307.49 of the Revised Code and the lump sum payment to beneficiaries as provided in section 3307.381 of the Revised Code, and to which shall be transferred from the employers' trust fund the amount required to fund all liabilities as of the end of each year.

(E) The "guarantee fund" is the fund from which interest is transferred and credited in the amounts in the funds described in divisions (A), (B), (C), and (D) of this section, and is a contingent fund from which the special requirements of said funds may be paid by transfer from this fund. All income derived from the investment of funds by the state teachers retirement board as trustee under section 3307.15 of the Revised Code, together with all gifts and bequests, or the income therefrom, shall be paid into this fund.

Any deficit occurring in any other fund that will not be covered by payments to that fund, as otherwise provided in this chapter, shall be paid by transfers of amounts from the guarantee fund to such fund or funds. Should the amount in

the guarantee fund be insufficient at any time to meet the amounts payable therefrom, the amount of such deficiency, with regular interest, shall be paid by an additional employer rate of contribution as determined by the actuary and shall be approved by the state teachers retirement board, and the amount of such additional employer contribution shall be credited to the guarantee fund.

The state teachers retirement board may accept gifts and bequests. Any funds that may come into the possession of the state teachers retirement board in this manner or that may be transferred from the teachers' savings fund by reason of lack of a claimant, or any surplus in any fund created by this section, or any other funds whose disposition is not otherwise provided for, shall be credited to the guarantee fund.

(F) The expense fund is the fund from which shall be paid the expenses for the administration and management of the state teachers retirement system as provided by this chapter.

Section 3307.651:

Interest compounded annually shall be credited to the accounts of members and to the various funds, and shall be assumed in determining actuarial factors, at rates recommended by the actuary and approved by the retirement board, but not less than three and twenty-five hundredths per cent effective September 1, 1965, except as follows:

(1) For the years stated the rates shall be as follows:

Years	Rates
9-1-1920/8-31-1955	4.00%
9-1-1955/8-31-1963	3.00
9-1-1963/8-31-1965	3,25

(2) Subsequent to August 31, 1959 interest shall be credited to accounts only at retirement.

(3) If the amount of the account at retirement is not a factor in determining the allowance, interest shall not be credited to such account after September 1, 1964.

(4) The actuary shall estimate the amount of interest reserve required in the teachers savings fund for credit to accounts when interest is to be a factor in determining the allowance, and the balance of the interest reserve in such fund shall be transferred to the employers trust fund as of September 1, 1965.

Section 3307.66:

Wherever in sections 3307.01 to 3307.72, inclusive, of the Revised Code, reference is made to the teachers' savings fund, the employers' normal accumulation fund, the employers' deficiency accumulation fund, the annuity and pension reserve fund, the guarantee fund, the survivors' benefit fund, or the expense fund, such reference shall be construed to have been made to each as a separate legal entity. This section does not prevent the deposit or investment of all such moneys intermingled for such purpose but such funds shall be separate and distinct legal entities for all other purposes.

Section 3307.711:

The granting of a retirement allowance, annuity, or pension to any person pursuant to action of the state teachers' retirement board vests a right in such person, so long as he remains the beneficiary of any of the funds established by section 3307.65 of the Revised Code, to receive such retirement allowance, annuity, or pension at the rate fixed at the time of granting such retirement allowance, annuity, or pension. Such right shall also be vested with equal effect in the beneficiary of a grant heretofore made from any of the funds named in section 3307.65 of the Revised Code.

The following section is that in effect
on and after March 31, 1997

Section 3307.80:

For the purposes of this section, "service credit" includes only service credit obtained pursuant to sections 3307,28, 3307.31, 3307.512, and 3307.73 of the Revised Code.

(A) The state teachers retirement system shall add to a member's accumulated contributions to be paid under section 3307.46 or 3307.48 of the Revised Code an amount paid from the employers' trust fund equal to one of the following:

(1) If the member has less than three full years of service credit, an amount equal to interest on the member's accumulated contributions, compounded annually, at a rate not greater than four per cent established by the board;

(2) If the member has three or more full years of service credit, but less than five full years, an amount equal to interest on the member's accumulated contributions, compounded annually, at a rate not greater than six per cent established by the board;

(3) If the member has five or more full years of service credit, the sum of the following amounts:

(a) An amount equal to interest on the member's accumulated contributions, compounded annually, at a rate not greater than six per cent established by the board;

(b) An amount equal to fifty per cent of the sum of the member's contributions and payments under sections 3307.28, 3307.51, and 3307.512 of the Revised Code plus an amount equal to interest on that amount at a rate not greater than six per cent established by tile board.

Interest for each year included in the calculation under this section shall be calculated from the first day of the

following year to the last day of the month preceding payment under section 1307.46 or 3307.48 of the Revised Code.

(B) Notwithstanding sections 3307.46 and 3307.48 of the Revised Code, neither the beneficiaries, survivors, nor estate of a deceased member who was granted disability benefits prior to death is eligible for the payment of any amount calculated under this section

United States Code

29 USC Section 1053(a)(1):

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

29 USC Section 1054(c)(1) and (2)(A)(B) and (C):

(1) For the purposes of this section and section 1053 of this title an employee's accrued benefit derived from employer contributions as of any applicable date is the excess (if any) of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2)(A) In the case of a plan other than a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is -

(i) except as provided in clause (ii), the balance of the employee's separate account consisting only of his contributions and the income, expenses, gains, and losses attributable thereto, or

(ii) if a separate account is not maintained with respect to an employee's contributions under such a plan, the amount which bears the same ratio to his total accrued benefit as the total amount of the employee's contributions (less withdrawals) bears to the sum of such contributions and the contributions multiplied by the appropriate conversion factor.

(B) (i) In the case of a defined benefit plan providing an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the accrued benefit derived from contributions made by an employee as of any applicable date is the annual benefit equal to the employee's accumulated contributions multiplied by the appropriate conversion factor.

(ii) For the purpose of clause (i), the term "appropriate conversion factor" means the factor necessary to convert an amount equal to the accumulated contributions to a single life annuity (without ancillary benefits) commencing at normal retirement age and shall be 10 percent for a normal retirement age of 65 years. For other normal retirement ages the conversion factor shall be determined in accordance with regulations prescribed by the Secretary of the Treasury or his delegate.

(C) For purposes of this subsection, the term "accumulated contributions" means the total of –

(i) all mandatory contributions made by the employee,

(ii) interest (if any) under the plan to the end of the last plan year to which section 1053(a)(2) of this title does not apply (by reason of the applicable effective date), and

(iii) interest on the sum of the amounts determined under clauses (i) and (ii) compounded annually at the rate of 5 percent per annum from the beginning of the first plan year to which section 1053(a)(2) of this title applies (by reason of the applicable effective date) to the date upon which the employee would attain normal retirement age.

For purposes of this subparagraph, the term "mandatory contributions," means amounts contributed to the plan by the employee which are required as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions.

Table of Statutes of States Which Pay Interest on Withdrawn Teacher Contributions

State	Statute	Section
Alabama	Code	16-25-14(g)
Alaska	Statutes	14.25.150 + .155
Arizona	Revised Statutes	38-740 + -762
Arkansas	Code	24-7-711
California	Education Code	23100,23802
Colorado	Revised Statutes	24-51-405 + -905
Connecticut	General Statutes	10-183k +h
Delaware	Code	5529 + 5530
Florida	Statutes	26-238.079(14)
Georgia	Official Code	47-3-123 + -128
Hawaii	Revised Statutes	88-84 + -96
Idaho	Code	59-1358, 9 + 61
Illinois	Statutes	40-5-16-138

State	Statute	Section
Indiana	Code	21-6.1-4-11, -5-14 + -7-11
Iowa	Code	97B.52 + .53
Kansas	Statutes	74-4916 + -4917
Kentucky	Revised Statutes	161.470(6) + (7)
Louisiana	Statutes	Interest not paid
Maine	Revised Statutes	5-17705 + -17953
Maryland	Code	21-311
Massachusetts	General Laws	32 Secs. 10 + 11
Michigan	Compiled Laws	38.1365
Minnesota	Statutes	354.47 + .49
Mississippi	Code	25-11-117
Missouri	Statutes	169.328
Montana	Code	19-20-603 + -1001
Nebraska	Revised Statutes	79-926 + -957
Nevada		No teacher contributions
New Hampshire	Revised Statutes	100A:11 I
New Jersey	Statutes	18A:66-34 + -38
New Mexico	Statutes	22-11-15 + -29
New York	Education law	11-5-12
North Carolina	General Statutes	135-5
North Dakota	Century Code	15-39.1-17 + -20
Ohio	Revised Code	Interest not paid
Oklahoma	Statutes	70-17-105(7)
Oregon	Revised Statutes	238.265 + .390

State	Statute	Section
Pennsylvania	Code	22-213-9 + -10
Rhode Island	General Laws	Interest not paid
South Carolina	Code of Laws	9-1-1650
South Dakota	Codified Laws	3-12-76
Tennessee	Code	8-37-210
Texas	Code	822.005
Utah		No teacher contributions
Vermont	Statutes	16-1940
Virginia	Code	51-1-161A + -162A
Washington	Revised code	41.32.510 + .805
West Virginia	Code	18-7A-23
Wisconsin	Statutes	40.73
Wyoming	Statutes	9-3-121

Totals

States which pay interest on withdrawn mandatory teacher contributions 45*

States which do not pay interest 3

Louisiana
Ohio

States which do not require teacher contributions 2

Nevada
Utah

* Some States require minimum service to receive interest. A few pay interest or an extra amount only with refunds upon death. Some interest rates are materially less than the net earnings rate of the plan.